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No. _____

In The

Supreme Court of the United States

SUSAN LUDWIG,

Petitioner,

v.

NORTHWEST AIRLINES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

1. DOES AN EEOC DETERMINATION FINDING REASONABLE CAUSE OF EMPLOYMENT DISCRIMINATION CREATE AN ISSUE OF MATERIAL FACT, SUCH THAT IT IS IMPROPER TO GRANT A MOTION FOR SUMMARY JUDGMENT IN FAVOR OF THE EMPLOYER?

2. WHERE A COURT OF APPEALS AFFIRMS A SUMMARY JUDGMENT BY INCORPORATING A DISTRICT COURT OPINION WHICH PRE-DATED *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, 530 U.S. 133 (2000), AND WHERE THE DISTRICT COURT OPINION IS INCONSISTENT WITH *REEVES*, SHOULD THIS COURT GRANT CERTIORARI AND REVERSE IN ORDER TO REQUIRE COMPLIANCE WITH THIS COURT'S PRECEDENTS?

3. IN AN EMPLOYMENT DISCRIMINATION CASE, SHOULD A DISTRICT COURT, WHEN CONSIDERING A SUMMARY JUDGMENT MOTION, GRANT DEFERENCE TO AN EMPLOYER'S ALLEGED SAFETY CONCERNS, RATHER THAN ALLOWING THE TRIER OF FACT TO DETERMINE THE VERACITY OF THE EMPLOYER'S SAFETY CONCERNS JUST AS OTHER FACT ISSUES ARE DECIDED BY A JURY?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Susan Ludwig,
   Petitioner;

2. Northwest Airlines,
   Respondent;

3. Jim Waide,
   Attorney for the Petitioner;

4. Timothy R. Thornton
   Attorney for Respondent;

6. Kristin L. Chong,
   Attorney for Respondent; and

7. Briggs & Morgan,
   Attorneys for Respondent.

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OPINIONS BELOW

The Court of Appeals' Opinion affirming the grant of summary judgment for the employer (Respondent), is attached hereto as App. 1 through App. 2. The District Court's Opinion granting summary judgment for Respondent is published at 98 F.Supp.2d 1057, and is attached hereto as App. 3 through App. 30. The Court of Appeals' Order Denying Petition for Rehearing is attached hereto as App. 31. The EEOC determination that Petitioner was the victim of willful sex discrimination is attached as App. 32 through 35.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eighth Circuit entered on January 5, 2001, App. 1, Petition for Rehearing denied on February 22, 2001, App. 31, by a Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1964, 42 U.S.C. § 2000(e) reads, in part:

> . . . It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to

his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

RULES OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 56(c) reads, in part:

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

Petitioner Susan Ludwig has been employed by Respondent as a flight attendant for over twenty-five (25) years. She holds an airline transport pilot's license, and a flight engineer rating. She has over 1800 flight hours of experience. Exhibits "F" and "Y"; Ludwig Affidavit. This case arises out of Respondent's rejection of Petitioner's application for an airline pilot position in 1995, when Respondent filled pilot positions with applicants from among its own employees. Exhibit "Y"; Fouchee depo., p. 17.

The District Court granted Respondent's motion for summary judgment, App. 29, and the Court of Appeals

affirmed on the basis of the District Court's Opinion. App. 2.

The District Court Opinion pre-dated *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) and did not correctly anticipate *Reeves* since it accepted as true movant's summary judgment evidence, and omitted crucial facts supporting non-movant (Petitioner).

The District Court Opinion omits the Equal Employment Opportunity Commission determination, which reads, in part:

> Examination of the evidence, both documentary and testimonial, indicates that there is reasonable cause to believe that violations of the statutes have occurred. The Respondent discriminated against the charging party by applying screening criteria during the 1995 internal pilot hiring process to her that was different from that applied to her male co-workers who were promoted to the pilot position. The evidence established that the charging party is a 45 year old white female, union employee who has been employed with the Respondent since January, 1974. Evidence supports the conclusion that the charging party, Susan Ludwig, was not promoted to the pilot training program position opening in 1995 because of her gender. The evidence established that the Respondent promoted less qualified male co-workers to the pilot training positions open in 1995. Evidence establishes that during the 1995 pilot hiring process, the charging party held a valid air-transport pilot license, a full flight engineer's certificate, had completed over 1800 hours of flight time as pilot or second in

> command, and was more qualified or as qualified in the areas of attendance and job performance than the successful male candidates. I, therefore, conclude that the Respondent, willfully, and with reckless disregard of the requirements of law, discriminated against the charging party as alleged.

App. 33-34.

Besides omitting the EEOC determination of discrimination, the District Court Opinion also omits other facts supporting Petitioner's claim of discrimination. These omitted facts will be stated in Reason II.

In granting summary judgment, the District Court relied upon a purported need for special deference for a commercial airline's hiring decisions because of the need to protect public safety. App. 14.

REASONS FOR GRANTING CERTIORARI

REASON I.

THE WRIT SHOULD BE GRANTED TO DETERMINE WHETHER AN EEOC DETERMINATION OF REASONABLE CAUSE CREATES AN ISSUE OF MATERIAL FACT, SUCH THAT IT IS INAPPROPRIATE TO GRANT AN EMPLOYER'S MOTION FOR SUMMARY JUDGMENT.

After stating facts forming the basis of its conclusion, the EEOC determined that:

> The Respondent, willfully, and with reckless disregard for the requirements of the law, discriminated against the Charging Party as alleged.

App., p. 34.

By granting summary judgment for the Respondent, without acknowledging the existence of this crucial EEOC finding, the Eighth Circuit Court of Appeals differs with other circuits. *Gifford v. The Atchison Topeka and Santa Fe Railway Co.*, 685 F.2d 1149, 1156 (9th Cir. 1992)[1] held:

> The EEOC, after an impartial investigation, found reasonable cause to believe that Gifford had been treated differently than similarly situated male employees. . . . The EEOC's report was sufficient at least to create an issue of material fact on this question. It was therefore improper for the trial court to resolve the issue on summary judgment.

The Eighth Circuit's approval of the grant of summary judgment contrasts with the Fifth Circuit's view of an EEOC reasonable cause determination. *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157 (5th Cir. 1972):

> To ignore the manpower and resources expended on the EEOC investigation and the expertise acquired by its field investigators in the area of the discriminatory employment practices would be wasteful and unnecessary. The fact that an investigator, trained and experienced in the area of discriminatory practices and the various methods by which they can be secreted, has found that it is likely that such an

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[1] However, *Coleman v. The Quaker Oats Company*, 232 F.3d 1271 (9th Cir. 2000) held: "Nor does EEOC reasonable determination create an issue of material fact." But see *Plummer v. Western International Hotel Co.*, 656 F.2d 502, 505 (9th Cir. 1981) (EEOC evaluation is "highly probative").

> unlawful practice has occurred, is highly probative of the ultimate issue involved in such cases.

The Tenth Circuit also disagrees with the Eighth Circuit decision to ignore an EEOC finding when ruling upon summary judgment. *Cervantes v. Wal-Mart Stores, Inc.*, 2001 U.S. App. LEXIS 63 at 10 (10th Cir. 2001) held:

> Clearly the EEOC report has probative value. On summary judgment, the report should have been addressed . . . .

The Sixth and Eleventh Circuits also hold that such EEOC determinations constitute substantial evidence of employment discrimination.[2] *Williams v. The Nashville Network*, 132 F.3d 1123, 1128-29 (6th Cir. 1997); *Walker v. Nations Bank of Fla., NA*, 53 F.3d 1548, 1554-55 (11th Cir. 1995); *Barfield v. Orange County*, 911 F.2d 644, 649 (11th Cir. 1990).[3]

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[2] Contra, *Paolitto v. Brown*, 151 F.3d 60 (2nd Cir. 1998) (disagreeing with "minority view" of per se admissibility of EEOC determination).

[3] When employment discrimination cases proceed to trial, there is also disagreement in the Circuits on the question of admissibility of EEOC determinations. For example, *Barfield v. Orange Co.*, 911 F.2d 644, 649-650 (11th Cir. 1990) noted: "Our sister circuits are split on the proper method for determining whether an EEOC report will be admissible in an employment discrimination case tried to a jury. The Ninth Circuit appears to have adopted a per se rule that 'a plaintiff has a right to introduce an EEOC probable cause determination in a Title VII lawsuit, regardless of whether other claims are asserted, *or whether the case is tried before a judge or jury.*' (citations omitted). The Fifth Circuit approaches that position, largely focusing a challenge under Fed.R.Evid. 403 n.5, by reserving the possibility that an EEOC determination could be excluded if . . .

As noted in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, N.22 (1981) (Blackman, J. dissenting):

> [C]omplainant in an EEOC charge evidently must present more proof to establish probable cause than to survive a summary judgment motion in federal court. Probable cause exists when there is "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious man into belief that the law is being violated." (citations omitted)

The Eighth Circuit decision to give no credence to an EEOC finding is especially troublesome since the EEOC went further than a mere "reasonable cause" or "probable cause" finding. Instead, it found Respondent acted "willfully" and "with reckless disregard for the requirements of the law". This is the standard for punitive damages under 42 U.S.C. § 1981a(b)(1).

The Eighth Circuit's disregard of the EEOC determination conflicts with the policy of giving weight to determinations of federal administrative agencies as expressed in *University of Tennessee v. Elliott*, 478 U.S. 778, 798 (1986), quoting with approval of Professor Davis' work on administrative law:

> To the extent that administrative adjudications resemble courts' decisions – a very great extent – the law worked out for courts does and should apply to agencies. 4 K. Davis, *Administrative Law Treatise*, § 21.9, p. 78 (2nd Ed. 1983).

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circumstances indicate lack of trustworthiness . . . ". "Other circuits, recognizing EEOC reports are not homogenous products; . . . have decided that the decision whether to admit an EEOC probable cause determination at a jury trial is in the discretion of the trial judge . . . ".

> The Restatement (Second) of Judgments § 83, p. 269 (1982), reaches a similar conclusion:
>
> 'Where an administrative forum has the essential procedural characteristics of a court, . . . its determination should be accorded the same finality that is accorded the judgment of a court.

By noting that administrative determinations, in certain situations, are accorded a *res judicata* effect, *Elliott* indicates deference should be given administrative determinations by a federal court. For a federal court to disregard an EEOC determination when deciding whether there exist questions of material fact is not consistent with the policy of according deference to determinations of a federal administrative agency charged with enforcing the statute at issue.

A lower court's decision to disregard an EEOC determination when considering a motion for summary judgment warrants this Court's review.

REASON II.

THE WRIT SHOULD BE GRANTED AND THE CASE REVERSED IN VIEW OF THE COURT OF APPEALS' INCORPORATION OF THE DISTRICT COURT OPINION WHICH PREDATED *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.* THE DISTRICT COURT OPINION CONTRADICTS *REEVES* BY ACCEPTING AS CORRECT MOVANT'S EVIDENCE AND DISREGARDING NON-MOVANT'S EVIDENCE.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097 (2000) resolved a conflict in the Courts

of Appeals in deciding which evidence a court may consider when ruling upon a summary judgment motion. *Reeves* held that a district court must not give credence to the evidence of the movant which is contradicted by nonmovant's evidence. 120 S.Ct. at 2110. The District Court Opinion violated this rule. It noted Respondent's evidence of disciplinary problems with Petitioner, but failed to note that there was no contemporaneous record of such problems, rather only affidavits executed for the purpose of this case. *See* Ludwig deposition and *see* Northwest H.R. Representative Emmeott deposition claiming performance problems, but attaching no contemporaneous records.

The District Court Opinion omits the fact that the Respondent ignored results of an objective test which females passed at a far higher rate than males. Fouchee depo., p. 19; Emmeott depo., p. 25. Sixty-seven (67%) percent of the female applicants, including Petitioner, passed this objective examination. However, only thirty-six (36%) percent of the male applicants passed the objective test. Emmeott depo., pp. 24-25. Furthermore, there is no discussion in the District Court's Opinion of the fact that after the results of the objective test were known to Respondent, it then discarded the objective test results and substituted subjective criteria in place of the initial objective test.

The District Court also omitted the devastating fact that had Respondent continued to use the objective test (known as the PSI), twenty-one (21) males but only two females would have been excluded. Emmeott supp. aff. The objective (PSI) test which disqualified an overwhelming number of males but only two females was replaced

by the consideration of an applicant's employment "background" because, according to Respondent, the objective test had eliminated some "good folks." Tice depo., pp. 15-16.[4]

Respondent justified Petitioner's disqualification based on her alleged poor employment background and attendance record. Chong aff., Exhibit "4." This alleged background included Respondent's claim that Petitioner had taken excessive amounts of leave.[5] Chong aff. But the District Court failed to mention that Petitioner's leave was all taken pursuant to Respondent's seniority rules, and Petitioner was never disciplined for attendance. *See* Emmeott depo. (Petitioner was "on border" of being disciplined for attendance).

The District Court failed to follow *Reeves* since it failed to draw permissible inferences favoring nonmovant. *Reeves*, 120 S.Ct. at 2110. For example, the District Court noted that Petitioner had failed the 1994 simulator test. But the District Court failed to note

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[4] Among the "good folks" qualified under the new 1995 subjective background standard was a male applicant who had a felony conviction for flying one of Respondent's planes while drunk. *See United States v. Prouse*, 945 F.2d 1107 (8th Cir. 1991) (affirming criminal conviction of successful internal male applicant Prouse for flying a Northwest Airlines aircraft while intoxicated).

[5] Much of the Petitioner's approved leave was taken so she could complete her undergraduate studies at Harvard University where she graduated number one (grade point 3.92) in her liberal arts degree program. Petitioner is currently working on her master's thesis at Harvard, having completed all academic requirements for a master's of liberal arts degree in history at Harvard. Ex. "Y".

Respondent in 1995 hired two (2) male applicants who had also failed the 1994 simulator test, and that, according to Respondent, the 1994 simulator test could not have been the reason Petitioner was not hired since her "background" was the only reason Petitioner was not hired in 1995.[6] Emmeott depo., p. 85.

In relying on failure of the 1994 simulator test for this 1995 hiring, the District Judge also failed to give weight to the fact that Petitioner had both an airline transport pilot's license and a full flight engineer's rating with over 1,800 hours of flight experience. According to J. Cronin, *Your Flight Questions Answered*, p. 85:

> The final step and the ultimate and commercial flying license is the airline transport license – it's like the 'Ph.D. of aviation' . . . It is earned on the basis of experience, a written test, and a flight test, usually in a multi-engine airplane.

While affording deference to the airline's alleged safety concerns in hiring pilots, the District Court Opinion omits the fact that the objective test which Respondent disregarded, and which most female applicants (including Petitioner) passed, was a test specifically designed to assure that applicants had the necessary skills to fly safely. Kern depo., pp. 15-25, 27, 29, 444, 445.

The District Court also fails to mention the fact that this objective test was eliminated for internal applicants

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[6] Many internal applicants failed the 1994 simulator test which was set with wind shear and severe turbulence in a DC9 simulator. The 1995 internal simulator test, which almost no one failed, was given in a 747 simulator. Ludwig affidavit, Ex. 430/EEOC.

over the objections of the senior legal member of the committee which had devised the hiring process, and that Respondent continued to use the objective test for external applicants. Tice depo., pp. 16, 18; Emmeott depo., p. 28.

The District Court also failed to draw proper inferences in favor of Petitioner when it omitted from its Opinion that at least five (5) of the male applicants who obtained pilot's positions had been disciplined for attendance and/or performance problems. Ex. DD.

By omitting so many facts and inferences favoring non-movant (Petitioner), by emphasizing movant's (Respondent's) evidence, and by omitting from its findings the crucial EEOC determination, the District Court did not correctly anticipate *Reeves*. *Reeves* had been decided by the time the Court of Appeals acted, but the Court of Appeals nevertheless affirmed on the basis of the pre-*Reeves*' District Court Opinion, thus disregarding *Reeves*. *Reeves* is of no effect if the lower courts ignore it.

REASON III.

THE WRIT SHOULD BE GRANTED TO CORRECT THE COURT OF APPEALS' AND DISTRICT COURT'S ERRONEOUS BELIEF THAT SPECIAL DEFERENCE SHOULD BE GIVEN AN EMPLOYER'S ALLEGED SAFETY CONCERNS RATHER THAN ALLOWING THE FACT-FINDER TO DETERMINE GENUINENESS OF THESE ALLEGED SAFETY CONCERNS.

In granting summary judgment, the court below has determined it is acceptable to deny applicants for commercial airline pilot positions a jury determination on the facts, which other potential employees receive. The District Court based its grant of summary judgment, in part, upon a special deference which it gave to the employer, since the airline industry was involved. The District Court stated:

> As aptly articulated by the Court of Appeals for the District of Columbia, '[T]he airline industry is one in which safety is of utmost importance. The staggering death tolls and resulting human suffering which have followed some of our nation's horrible airline disasters attest to this fact. Therefore, in our judgment, the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated most safely[.]' *Murname v. American Airlines Inc.*, 667 F.2d 98 (D.C. Cir. 1981). Accordingly, Northwest retains a wide degree of discretion when making decisions in the hiring of pilots who will ultimately be responsible for the safety of thousands of air travelers.

App. 14.

This rationale means that potential airline pilots have judges, not juries, decide the facts. In this case, Petitioner's evidence was that the Respondent disregarded the objective test which best determined airline pilot safety. There is nothing in Title VII of the Civil Rights Act of 1964 which indicates whether an issue of material fact exists depends upon whether the employer's articulated reason for its decision relates to public safety. There is no rule of law which says that a judge, rather than a jury, is best suited to determine whether considerations of public safety or discriminatory reasons motivated the employer. Instead, questions of motivation and intent are questions of fact for the jury. *Reeves*, 120 S.Ct. at 2110.

As the Fifth Circuit has observed, questions of the "main springs of human experience" are *fact* questions for the jury, and not questions of law for the Court. *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1126 (5th Cir. 1978); *accord, Walker v. Thompson*, 314 F.3d 615 (5th Cir. 2000) (common sense question of whether the employer took proper remedial measures was a question of fact for the jury not of law for the court); *Rizzo v. Children's World Learning Center*, 213 F.3d 289 (5th Cir. 2000) (common sense question of whether employee's conduct was a "direct threat" should not be decided as a matter of law, but was a fact question for the jury).

Similarly, the matter of the genuineness of the Respondent's claim of concern for public safety is a fact question, and labeling such an issue as an issue of law is inconsistent with the appropriate division of authority between judge and jury. *See* Eric Schnapper, *Judges*

Against Juries, Appellate Review of Federal Jury Verdicts, 1989 Wisc. L. Rev. 227.

CONCLUSION

This case represents an arbitrary refusal to give effect to an EEOC determination when deciding a motion for summary judgment. Additionally, it declines to follow *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) and it improperly labels as an issue of law what should be an issue of fact. Review by this Court is warranted.

Respectfully submitted,

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App. 1

United States Court of Appeals, Eighth Circuit.

Susan LUDWIG, Appellant,

v.

NORTHWEST AIRLINES, INC., Appellee.

No. 00-2258.

Submitted Dec. 14, 2000.
Decided Jan. 5, 2001.

Appeal from the United States District Court for the District of Minnesota.

Before *LOKEN* and *MAGILL*, Circuit Judges, and *BATTEY*,[1] District Judge.

[UNPUBLISHED]

PER CURIAM.

**I Susan Ludwig (Ludwig) appeals [sic] the district court's[2] order granting summary judgment in favor of her employer, Northwest Airlines, Inc. (Northwest), in this employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Minnesota Human Rights Act, Minn.Stat. § 363. After de novo review, *see Rose-Maston v. NME Hosps., Inc.*, 133 F.3d 1104, 1107 (8th Cir.1998), we conclude the district court's

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[1] The Honorable Richard H. Battey, United States District Judge for the District of South Dakota, sitting by designation.

[2] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

judgment was proper for the reasons stated in its thorough opinion. Accordingly, we affirm the judgment of the district court. *See* 8th Cir. R. 47B.

A true copy.

App. 3

United States District Court, D. Minnesota.

Susan LUDWIG, Plaintiff,

v.

NORTHWEST AIRLINES, INC., Defendant.

No. Civ. 98-1580PAM/FLN.

April 5, 2000.

Stephen W. Cooper, Kathryn J. Cima, Stacey R. Everson, Eric D. Bull, Cooper Law Office, Minneapolis, MN, for Susan Ludwig, Plaintiff.

Timothy Robert Thornton, Lauren Elizabeth Lonergan, Kristin L. Chong, Briggs & Morgan, Minneapolis, MN, for Northwest Airlines, Inc., Defendant.

MEMORANDUM AND ORDER

MAGNUSON, Chief Judge.

This matter is before the Court upon Defendant Northwest Airlines, Inc.'s Motion for Summary Judgment. For the following reasons, the Court grants Defendant's motion.

BACKGROUND

Plaintiff Susan Ludwig ("Ludwig") has been a Northwest Airlines, Inc. ("Northwest") flight attendant since 1974. During her long tenure with Northwest she has had [sic] received numerous commendations for her work.[1]

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[1] Ludwig states that she has received a "stack" of commendations. (*See* Pl.'s Mem. at 3.) Although she has

She has also been cited several times for attendance, performance, and behavioral difficulties. For example, between 1991 and 1995 Ludwig received five doctor's note advisories[2] and was either sick or on leave for most of 1995. (*See* Def.'s Mem. at 6; Def.'s Exs. 10-16; Emeott Aff.Ex. E.) She has also been involved in several incidents, which according to Northwest, evince problematic behavior. The first such incident was a security breach in Sacramento in which Ludwig disregarded FAA regulation by entering a secure area unescorted. (*See* Emeott Aff.Ex. A.) When told to leave the area, Ludwig allegedly behaved indignantly and defiantly, and was thereafter described by the manager on duty as a "very difficult person to deal with." (*See id.*) The second incident was also a [sic] classified as a security breach. According to the report, Ludwig called Crew Scheduling during a security alert to complain about staffing, but refused to identify herself, as required. (*See* Emeott Aff.Ex. B.) Once again, Ludwig was reportedly hostile, unprofessional, and defiant during the encounter. (*See id.*) Third, Ludwig failed to account for $47 of in-flight liquor sales, and

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received numerous commendations, the "stack" provided to the Court consisted primarily of duplicates and documents not constituting commendations. In fact, there were only 12 documents that could possibly qualify as commendations in the 44 documents provided by Ludwig. (*See* Pl.'s Ex. W.)

[2] A flight attendant will receive a doctor's note advisory if his or her sick leave exceeds three sick incidents in a twelve month period. (*See* Chong Aff.Ex. 2 at 14.2.) The advisory alerts employees that a doctor's note will be required the next time there is a sick incident. (*See id.*) This policy is designed to deter sick leave abuse. (*See* Def.'s Mem. at 6.)

thereafter failed to complete the required forms explaining the discrepancy in a timely manner. (*See* Emeott Aff.Ex. F.)

The fourth incident occurred in the 1980's during a flight simulator test. (*See* Pl.'s Ex. CC.) According to instructor Stephen Wilkinson, after Ludwig "decisively" failed the test, she proceeded to become "extremely abusive" toward him, as well as the presiding Federal Aviation Administration ("FAA") inspector. (*Id.*) Wilkinson ultimately described her as "so belligerent, so unable to face criticism, so narrowly focused as to be unable to realize dangerous situations." (*Id.*)

In 1994, Ludwig applied for a pilot position through Northwest's internal hiring process. The three-step process first required applicants to meet minimum objective criteria, which included having a commercial pilot's license, a flight engineer rating or a passing score on a flight engineer's written exam, and 1000 total flight hours. (*See* Pl.'s Ex.G.) If the applicant met these criteria, he or she proceeded to Phase I of the process, which consisted of a standardized battery of tests administered to measure general cognitive ability, intelligence, psychological characteristics, Crew Resource Management ("CRM") skills,[3] and interpersonal skill performance. (*See*

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[3] CRM skills include: stress tolerance, leadership, group cohesiveness, teamwork, personality, communications skills, and assertiveness. The Federal Aviation Administration ("FAA") and the National Transportation Safety Board ("NTSB") have attributed a significant percentage of major carrier accidents to CRM failures. (*See* Def.'s Mem. at 2, n. 3.) Such skills are therefore considered to be of primary importance in any pilot candidate. (*See* Foushee Dep. at 41-44.)

Foushee Dep. at 9.) To measure these skills, Northwest administered the Multidimensional Aptitude Battery ("MAB") and the Personal Characteristics Inventory ("PCI"), both objective tests. (*See id.*) If the applicant passed through Phase I, he or she moved on to Phase II, which included a panel interview and a flight simulator test.

Although Ludwig met the minimum objective criteria and passed through Phase I of the process in 1994, she decisively failed the simulator test and was promptly eliminated from the application process. (*See* Emeott Dep. at 43.)

Ludwig reapplied for a pilot position in 1995. Once again, Northwest found that Ludwig met the minimum objective criteria, and she moved on to Phase I.[4] Ludwig also passed through the objective battery of tests administered in Phase I. After the Phase I tests had been scored, however, Northwest decided to supplement the application process with a background check. (*See* Emeott Dep. at 13, 23-25.) Northwest claims that its decision to supplement the Phase I process in this manner was prompted by the low "select-in" rate of both male and female applicants. (*Id.* at 25.) With the implementation of the background check, those individuals who had failed the Phase

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[4] In fact, Ludwig did not meet the minimum threshold criteria because she did not satisfy the continuous employment requirement. (*See* Emeott Dep. at 51-53.) In particular, she was not at work for most of 1995, and there was a continuous three month period where she was not at work at all. (*See id.*) Nevertheless, Northwest waived the continuous employment requirement for her and allowed her to proceed to Phase I of the hiring process. (*See id.*)

I tests remained pilot candidates. According to Northwest, the background check was a better indicator of CRM skills and commercial pilot readiness than the objective tests previously administered. (*See* Foushee Dep. at 42-44; Kern Dep. at 35-36.) Ludwig, though, argues that the background check was implemented because too many women, and not enough men passed the Phase I battery of tests. In support of this accusation, she cites the negative effect the background check ultimately had on female applicants. For example, although six of the nine remaining females passed the Phase I objective tests, only five of the nine passed the background check (*See* Pl.'s Mem. at 12.)

Ludwig was one of the females who passed through the objective testing in Phase I, but failed to meet the background check criteria. Northwest cites her high absenteeism, low CRM skills, troublesome attitude, and poor performance as reasons for her elimination. (*See* Def.'s Mem. at 6-8.) As noted by Robert Tice ("Tice"), senior labor counsel for Northwest, "[p]oor attendance as a flight attendant [is regarded as] an indicator of future performance in a piloting position. And poor performance with respect to getting along with fellow employees, respecting rules and the authority of governmental agencies, etcetera, [ ] is extremely important to predicting future performance as a pilot." (Tice Dep. at 57.) Ludwig contends that she was eliminated because she is female.

On September 3, 1996, Ludwig filed a charge with the Equal Employment Opportunity Commission ("EEOC")

alleging discrimination on the basis of sex for her elimination from the pilot hiring process in 1995 and retaliation for her complaints about the 1994 hiring process. Ludwig has never alleged that she was discriminated against during the 1994 hiring process. The EEOC issued a Right to Sue letter and Ludwig promptly sued Northwest alleging that she was discriminated against on the basis of sex in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, and the Minnesota Human Rights Act, Minn.Stat. § 363.01 ("MHRA").

On July 11, 1997, Ludwig filed a second EEOC complaint, alleging that she was retaliated against for filing her discrimination claim. In particular, she alleged that she was unfairly denied a transfer and was generally held to a higher standard than similarly situated employees who have not filed such complaints. Once again, Ludwig was issued a Right to Sue letter by the EEOC. Thereafter, she filed a second suit alleging retaliation in violation of Title VII and the MHRA; negligent supervision, training, retention and hiring; and intentional infliction of emotional distress. The two cases were consolidated on January 27, 1999. On September 3, 1999, Northwest filed the instant Motion for Summary Judgment.

DISCUSSION

A. Standard

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer*

Co., 980 F.2d 1217, 1219-20 (8th Cir.1992). The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *See Enterprise Bank v. Magna Bank*, 92 F.3d 743, 747 (8th Cir.1996). However, as the United States Supreme Court has stated, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action." *Celotex*, 477 U.S. at 327, 106 S.Ct. 2548 (quotation omitted).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Enterprise Bank*, 92 F.3d at 747. The nonmoving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. *See Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir.1995). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Krenik*, 47 F.3d at 957.

B. Title VII and MHRA Claims

1. *Disparate Treatment*

Title VII and MHRA disparate treatment claims are analyzed under the three-step framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804, 93

S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Lee v. Minnesota*, 157 F.3d 1130, 1133 (8th Cir.1998) (citing *Feges v. Perkins Restaurants, Inc.*, 483 N.W.2d 701, 710 (Minn.1992)). The first prong requires the plaintiff to establish a prima facie case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817. If the plaintiff meets this obligation, the burden shifts to the defendant to proffer a nondiscriminatory explanation for its conduct. *See id.* If the defendant meets this burden, the prima facie presumption of discrimination disappears. The burden then reverts to the plaintiff to establish that the defendant's proffered legitimate reason was pretextual. *See id.* at 804, 93 S.Ct. 1817.

"The burden of establishing a prima facie case of disparate treatment is not onerous." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). A plaintiff must merely prove by a preponderance of the evidence that: 1) she was a member of a protected class; 2) she was qualified for the position; 3) she was not hired for that position; and 4) the employer filled the position with a person not in the protected class. *See McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817. It is undisputed that Ludwig meets the first, third, and fourth criteria, therefore, the only real issue is whether Ludwig was "qualified" to be a Northwest pilot. Ludwig argues that she was qualified for the position because she met the minimum objective criteria, such as having a commercial pilot's license, a flight engineer rating, and 1000 total flight hours. In order to become a commercial pilot for Northwest, however, applicants are also required to possess a certain measure of general cognitive ability, intelligence, psychological characteristics, CRM skills, and interpersonal skills. In addition, the

applicant must also be able to pass a flight simulator test. Northwest argues that Ludwig was not qualified to be a Northwest pilot because, in its opinion, she could not meet all of these criteria.

In order to be deemed "qualified" at this stage of the analysis, Ludwig need only establish that she met the minimum "objective qualifications for the job." *Legrand v. Trustees of Univ. of Arkansas at Pine Bluff*, 821 F.2d 478, 481 (8th Cir.1987); *see also Hase v. Missouri Div. of Employment Security*, 972 F.2d 893, 896 (8th Cir.1992) (holding that in order to establish a prima facie case under the *McDonnell Douglas* framework, a plaintiff must demonstrate that he meets the "minimum qualifications for the position"); *Axtel v. Northwest*, No. 97-2632, slip op. at 8 (D.Minn. June 30, 1999) ("While recognizing NWA's interest in evaluating a candidate's CRM and technical skills though [sic] an interview process, the law of this circuit makes clear that only objective criteria can be used when evaluating whether a plaintiff has made out a prima facie case."). Subjective qualifications of the employee are analyzed later, under step two of the analysis. *See Legrand*, 821 F.2d at 481 (citing *Lynn v. Regents of the Univ. California*, 656 F.2d 1337, 1344-45 (9th Cir.1981)).

Because it is clear that Ludwig met the minimum objective criteria for the position – that is, the posted qualifications – the Court concludes that Ludwig was in fact "qualified" for the position within the meaning of *McDonnell Douglas* and its progeny. Accordingly, the Court finds that Ludwig has established a prima facie case of discrimination.

In order to rebut the presumption of discrimination, Northwest must proffer a legitimate non-discriminatory reason for its hiring decision. *See McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. 1817. Northwest has done just that by citing high absenteeism, low CRM skills, troublesome attitude, and poor performance as its reasons for eliminating Ludwig from the applicant pool. Accordingly, the Court concludes that Northwest has met its burden under the second step of *McDonnell Douglas.*

Because Northwest has successfully rebutted the presumption of discrimination, "the factual inquiry proceeds to a new level of specificity." *Burdine,* 450 U.S. at 255, 101 S.Ct. 1089. Ludwig bears the ultimate burden of persuading the Court that "she has been the victim of intentional discrimination." *Id.* at 256, 101 S.Ct. 1089. More specifically, in order to survive summary judgment Ludwig must proffer evidence of pretext – i.e., that her rejection was driven by discriminatory motives rather than legitimate business reasons. Ludwig may do this "directly, by persuading the court that a discriminatory reason more likely [than not] motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence." *Hase,* 972 F.2d at 896 (quoting *Burdine,* 450 U.S. at 256, 101 S.Ct. 1089).

Ludwig simply cannot meet this burden. She makes numerous conclusory statements that, if supported by the record, could possibly establish pretext. For example, "Defendant attempted to exclude Plaintiff at this early stage [Phase I], using a different application of the rules than was used for at least two male applicants." (Pl.'s Mem. at 5.) This averment, however, is not supported by

the record. Ludwig has supplied the Court with voluminous documentation about the other applicants, most of which is either indecipherable or unsupportive of her position. Through this evidence, Ludwig has utterly failed to establish that the male candidates were "similarly situated in all relevant respects." *Lanear v. Safeway Grocery*, 843 F.2d 298, 301 (8th Cir.1988). To the contrary, none of the male applicants had the same behavioral and performance difficulties as Ludwig. (*See* Pl.'s Ex. A.) In addition, Ludwig appears to have had the most consistent and recent attendance problems of any other applicant. (*See id.*; Pl.'s Mem. at 9; Def.'s Exs. 10-16; Emeott Aff.Ex. E.) Thus, she has failed to establish that the male candidates were similarly situated in all relevant respects.

Ludwig further alleges that "Defendant, then solely because it did not like the fact that certain men had failed[,] substituted the test with a less reliable, more subjective criteria." (Pl.'s Mem. at 18.) And, "[i]t appears however, that Northwest did not like the high proportion of females excelling on the test." (*Id.* at 6.) Again, neither of these statements are anything more than bald accusations, wholly conclusory and unsupported by the record. In fact, Northwest's decision to implement the background check resulted in the hiring of a female applicant who would otherwise have been eliminated from the process on the basis of her PCI score. (*See* Emeott Supp.Aff. § 4.)

Furthermore, Ludwig's conclusory allegations that she is eminently qualified to be a commercial airline pilot and that her employment file was scrutinized more vigorously than male applicants carries no weight in the Court's analysis. *See* Fed.R.Civ.P. 56(e) (stating that a

party opposing summary judgment may not rest on mere allegations, but must set forth specific facts showing that there is a genuine issue for trial). What does matter, however, is "whether the employer gave an honest explanation of its behavior." *Krenik*, 47 F.3d at 960. The Court is persuaded that Northwest has done just that.

> Moreover, given the substantial public safety implications attendant to the hiring of commercial airline pilots, the Court accords Northwest "considerable discretion" in making such decisions. *Axtel*, slip op. at 9. As aptly articulated by the Court of Appeals for the District of Columbia,
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> [T]he airline industry is one in which safety is of the utmost importance. The staggering death tolls and resulting human suffering which have followed some of our nation's horrible air disasters attest to this fact. Therefore, in our judgment, the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated most safely[.]

Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C.Cir.1981). Accordingly, Northwest retains a wide degree of discretion when making decisions in the hiring of pilots who will ultimately be responsible for the safety of thousands of air travelers.

In sum, Ludwig's failure to affirmatively establish evidence of pretext, coupled with the deference commercial airlines are afforded in hiring pilots, leads the Court to conclude that Northwest's stated reasons for its decision with respect to Ludwig are non-pretextual and worthy of credence. Accordingly, Northwest's Motion for

Summary Judgment is granted as to Ludwig's Title VII and MHRA disparate treatment claim.

2. *Disparate Impact*

Disparate impact claims challenge employment practices that are "facially neutral but that fall more harshly on one group than another and cannot be justified by business necessity." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36, n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). To establish a prima facie case of disparate impact, the plaintiff must demonstrate that a specific employment practice has a significant impact on a protected group. *See Houghton v. SIPCO, Inc.*, 38 F.3d 953, 958 (8th Cir.1994). This is typically done through the use of statistical evidence, which reveals that the practice in question has excluded applicants due to their membership in a protected group. *See Langlie v. Onan Corp.*, 192 F.3d 1137, 1140 (8th Cir.1999), *petition for cert. filed*, (U.S. Jan. 26, 2000) (No. 99-1387), (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)). If the plaintiff meets this burden, the defendant must demonstrate that there is a "business justification" for the challenged practice. *Houghton*, 38 F.3d at 958 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989)). The plaintiff may rebut the defendant's business necessity defense by proffering an equally effective, but less discriminatory alternative employment practice. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 45 L.Ed.2d 280

(1975); *see also Allen v. Entergy Corporation, Inc.*, 193 F.3d 1010, 1013 (8th Cir.1999). Throughout the analysis, the burden of persuasion remains with the plaintiff. *See Houghton*, 38 F.3d at 958.

The Court assumes, without deciding, that Ludwig has made a prima facie case of disparate impact and turns directly to the question of whether Northwest's employment practice is justified by business necessity.[5] In order to meet this burden, Northwest must demonstrate that the hiring practice has a "manifest relationship to the employment in question . . . and that it is necessary to safe and efficient job performance." *Smith v. City of Des Moines*, 99 F.3d 1466, 1471 (8th Cir.1996) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), *Dothard v. Rawlinson*, 433 U.S. 321, 332 n. 14, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977)).

> The employment practice condemned by Ludwig appears to be Northwest's use of the background check during Phase I of the internal hiring process. Northwest argues that the background check has a manifest relationship to the pilot position because it measures CRM skills, which are essential qualities in a commercial pilot. (*See* Foushee Dep. at 41-44.) CRM skills, which include

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[5] Because the business justification for Northwest's implementation of the background check is so compelling, the Court does not fully addressing whether Ludwig has made a prima facie case of disparate impact. Given the small sample size and the cursory affidavit provided by Ludwig's expert in an effort to establish disparate impact, (*see* Lorenz Aff.) the Court seriously doubts whether she has in fact made such a showing.

> stress tolerance, leadership, group cohesiveness, teamwork, personality, communications skills, and assertiveness, are generally considered to be strong predictors of successful commercial piloting, and are precisely the kind of qualities that may be gleaned from employment files. When asked how the background check related to CRM skills, Dr. H. Clayton Foushee, Jr. responded that,
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> [P]ast behavior is a very good predictor of future behavior. In the case of the internal applicants, we felt that it was extremely important and in fact far more predictive to look at their employment history, and to see if there was any evidence in any of their records that they had difficulties dealing with other employees, had been involved in significant disputes, so on and so forth. So the relationship between that behavior, and if I find in an employment jacket that an employee has had a number of complaints filed against them by passengers or they have had disputes with their supervisors or there is some sort of history of confrontational behavior, I would be very concerned about that individual's ability to blend in and work effectively as a member of a cockpit team. And I would find that highly predictive of so-called CRM behavior.

(*See* Foushee Dep. at 42-43.) Indeed, Northwest believed that the background check would do a better job of screening out poor pilot candidates than the objective tests. (*See id.* at 24.) Therefore, the Court concludes that the background check bears a manifest relationship to the pilot position.

For similar reasons, the Court finds that Northwest also meets the second prong of the test. As previously noted, CRM skills are considered to be accurate indicators of pilot success. In other words, a pilot with low CRM skills is deemed more likely to be involved in, and cause accidents than pilots with high CRM skills. (*See* Def.'s Mem. at 2 n. 3.) Thus, the background check, which measures CRM skills, is "necessary to safe and efficient job performance." *Smith,* 99 F.3d at 1471.

Moreover, as noted above, a commercial airline is yielded a substantial degree of deference when its hiring decision affects public safety.

> When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related. . . . The job of airline flight officer is clearly such a job.

Boyd v. Ozark Air Lines, Inc., 568 F.2d 50, 54 (8th Cir.1977) (quoting *Spurlock v. United Airlines, Inc.,* 475 F.2d 216, 219 (10th Cir.1972)). Accordingly, the Court concludes that Northwest has met both prongs of the business necessity test.

Although required to do so in order to maintain her claim, Ludwig has not presented sufficient evidence to rebut Northwest's business necessity defense. *See Albemarle*, 422 U.S. at 425, 95 S.Ct. 2362. She argues that the MAB and PCI are less discriminatory than the background check. Even if true, Northwest has presented ample evidence that the background check is a better indicator of pilot success than the MAB and PCI. (*See* Foushee Dep. 41-44; Kern Dep. at 35-36.) Notably, Ludwig has presented no evidence to the contrary. The Court therefore concludes that she has failed to meet her burden of persuasion, particularly in light of the deference imparted to airlines in the hiring of commercial pilots. Accordingly, Ludwig's disparate impact claim is dismissed as a matter of law.

3. *Retaliation*

Ludwig alleges that she suffered from adverse employment action in direct retaliation for her decision to file an EEOC complaint, in violation of Title VII and the MHRA. As a threshold matter, Northwest's [sic] argues that Ludwig's claim should be dismissed because she failed to arbitrate the matter, as required under her collective bargaining agreement ("CBA"). The Court need not proceed too far with this analysis, for it appears that the Eighth Circuit strongly disfavors the enforcement of arbitration clauses that are imposed upon the employee, as in this case, by way of a CBA. *See Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir.1997) ("We have held that arbitration agreements contained within a CBA do not bar civil claims under Title VII."). The Court

therefore concludes that Ludwig's retaliation claim need not be arbitrated.

Next, Northwest argues that even if Ludwig is not required to arbitrate, her claim is nonetheless preempted by the Railway Labor Act (RLA). The RLA provides the exclusive means by which minor labor disputes – disputes in which the parties seek to enforce existing contractual rights – are resolved. *See* 45 U.S.C. § 184; *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 439 (8th Cir.1998). Although Northwest's rights under the CBA are tangentially involved, Ludwig's retaliation claim arises independent of the CBA. That is, by bringing a claim under Title VII and the MHRA, Ludwig seeks to enforce federal and state statutory rights, not a contractual right contemplated by the CBA. *See Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1115 (8th Cir.1995). Thus, because Title VII and the MHRA are the sources of the claim, rather than the CBA, the Railway Labor Act does not preempt Ludwig's retaliation claim. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 256, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994) (holding that the RLA does not preempt claims to enforce rights independent of the collective bargaining agreement); *see also Taggart v. Trans World Airlines, Inc.*, 40 F.3d 269, 274-75 (8th Cir.1994) (holding that a state law discrimination claim is not preempted by RLA).

Accordingly, the Court turns to the merits of Ludwig's retaliation claim. Like discrimination claims under Title VII and MHRA, retaliation claims are analyzed under the *McDonnell Douglas* framework. *See Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 818 (8th Cir.1998); *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn.1983). In order to prove a prima facie case of

retaliation, Ludwig must demonstrate that: 1) she engaged in statutorily protected activity; 2) she suffered an adverse employment action; and 3) there was a causal connection between the adverse employment action and the protected activity. *See Smith,* 151 F.3d at 818. Northwest argues that Ludwig has not established a prima facie case of retaliation because she cannot meet the second and third factors. The Court agrees.

In the statement of facts in her Memorandum in Opposition to Summary Judgment, Ludwig alleges the following instances of adverse employment action by Northwest, all of which occurred after she was eliminated from the 1995 hiring process: 1) unfair denial of her transfer request; 2) unnecessary "coaching" regarding sick leave; 3) unreasonable investigation of a potential security breach; 4) initiating several unwarranted "see me" notes; 5) requiring her – for the first time in her extended tenure at Northwest – to undergo drug testing; 6) sending her a "threatening" letter asking her to stop "enlisting support" from other Northwest personnel for her EEOC complaint; and 7) making phone calls to her home questioning her performance and attendance. (*See* Pl.'s Mem. at 13-15.) However, in the argument section of her Memorandum Ludwig focuses on Northwest's actions during the 1995 pilot hiring process as evidence of retaliation. For example, she describes the relevant adverse employment action as the "loss of a job opportunity." (Pl.'s Mem. at 24.) Her argument makes clear that the job opportunity to which she refers was her elimination from the pilot hiring process. In particular, she alleges that "Plaintiff's job performance and disciplinary record was altered to make it appear more negative.

Defendant, in essence, began to carefully scrutinize Plaintiff to find a basis to prevent her from being a Northwest Pilot." (*Id.*) These allegations, even if true, simply cannot constitute retaliation because they would have occurred before Ludwig filed her first EEOC complaint, the filing of which allegedly propagated the retaliation. Notwithstanding this bewildering inconsistency, the Court will examine each of Ludwig's post-EEOC filing allegations in determining whether she suffered any kind of adverse employment action.

Although Ludwig did not suffer from blatant adverse employment action, such as a demotion or termination, the Court recognizes that employer action need not rise to that level to be considered adverse. *See Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir.1997). At the same time, however, mere inconvenience or unhappiness on the part of the employee will not lead to a finding of actionable adverse employment action. *See id.; Enowmbitang v. Seagate Technology, Inc.*, 148 F.3d 970, 973 (8th Cir.1998). Rather, "[a]dverse employment action is that which materially alters the terms or conditions of the plaintiff's employment." *Enowmbitang*, 148 F.3d at 973. Such actions traditionally include "ultimate employment decisions," such as hiring, granting leave, discharging, promoting, and compensating. *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir.1997); *see also Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir.1995). Based on this standard, the Court concludes that none of the instances on which Ludwig relies constitute adverse employment action.

Ludwig's first claimed instance of adverse action was Northwest's denial of her request for a supervisor transfer. Ludwig has provided very little information about

this alleged denial. In fact, she has completely failed to show that such a denial was even atypical, such that it might be considered adverse. For example, Ludwig said that she "believed" that there were Northwest employees who had successfully transferred to different supervisors. (Ludwig Dep. at 92.) Yet, she could only name one employee, Ruth Jordan, who she thought might have been granted such a transfer. (*See id.*) Even if she could establish that every employee except her had been transferred upon request, such a denial simply does not constitute a material change in her employment status because as a result of the denial, Ludwig merely maintained the status quo.

Second, Ludwig contends that she was "coached" regarding sick leave. When pressed at her deposition, however, she admitted that she had not actually been coached, and conceded that even if she had been, such action is not generally considered to be disciplinary in nature.[6] (*See* Ludwig Dep. at 93.) Given this admission, the Court would be hard-pressed to find that "attempted coaching" constituted adverse or any other kind of employment action. Moreover, there is ample evidence that Ludwig did in fact have an attendance problem. (*See* Def.'s Exs. 10-16; Emeott Aff.Ex. E.) Holding that "coaching," when warranted, constitutes an adverse employment action would emasculate employers and dissuade

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[6] Ludwig has attempted to establish that the "attempted coaching" was in fact disciplinary because it was used against her in the pilot selection process. (*See* Ludwig Dep. at 93.) Once again, any Northwest conduct that occurred before Ludwig filed her first EEOC complaint cannot be considered retaliatory for purposes of this lawsuit.

them from not only discussing legitimate performance concerns with their employees, but also from helping their employees perform better in the future. The Court will not impose such a sweeping limitation on employers.

Third, Ludwig contends that she suffered from adverse employment action when she was investigated for an alleged security breach in Boston. Once again, although it is not disputed that she was investigated for this incident, nothing ever came of it. She was never reprimanded, formally or informally, nor were the terms of her employment altered. Even if Northwest investigated the incident with unusual vigor,[7] there was no attendant material alteration of the terms or conditions of her employment. Furthermore, Northwest is required by law to investigate potential breaches of security in order to ensure the "highest possible degree of safety in the public interest." 49 U.S.C. § 44701(d)(1)(A). The Court will not, without cause, inhibit investigations into such matters.

Fourth, Ludwig contends that she received several "see me" notes, which she perceived to be negative and damaging. Although Ludwig asserts that she received "five or six" such notes, when pressed at her deposition, she could only recall two specific instances in which she received such notes. (*See* Ludwig Dep. at 71-72.) Even if she could provide specific information about all of the notes she claimed she has received, such notes are not necessarily disciplinary or adverse in nature. (*See* Def.'s

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[7] Ludwig's union representative, Yvonne Thompson, characterized Northwest's investigation a "Witch Hunt." (Pl's.Ex. N.)

Ex. 30.) Moreover, Ludwig has provided no information demonstrating that the notes materially, or even immaterially, changed the terms or conditions of her employment.

Fifth, Ludwig alleges that Northwest retaliated against her by forcing her to undergo two drug tests for the first time in her 25 year tenure. Northwest does not dispute that she was given the drug tests, but explains that random drug tests are administered by an outside organization, at its discretion. (*See* Tice Dep. at 51-54.) Ludwig has provided no evidence to the contrary. Because Northwest did not control the decision to test Ludwig for drugs or alcohol, such testing could not have been retaliatory in nature. Moreover, two drug tests over 25 years, regardless of when they occurred, do not evince adverse action. Without more, their timing can only be deemed a coincidence.[8]

Sixth, Ludwig alleges that Robert Tice sent her a "threatening" letter asking her to stop "enlisting support" from other Northwest personnel for her EEOC complaint. (Pl.'s Mem. at 13.) This description of the letter is incomplete and misleading. In fact, the letter asks Ludwig to stop using company resources to enlist support

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[8] This certainly does not mean that drug testing can never be considered an adverse employment action. *See, e.g., Adams v. American Airlines, Inc.*, 2000 WL 14399, at *5 (10th Cir.2000) ("We assume, without deciding, that, if Adams could prove in this case that the IVRS was deliberately manipulated such that Adams was subjected to significantly more drug tests than she otherwise would have been absent such manipulation, such evidence could establish adverse employment action for purposes of her prima facie case of retaliation.").

and to refrain from contacting employees while they are on duty. (*See* Pl.'s Ex. C.) Tice explained that such conduct was specifically prohibited by Northwest's Rules of Conduct, with which Ludwig was required to comply. (*See id.*) Thus, through the letter, Tice was simply attempting to stop Ludwig from doing something that she was already bound not to do. This does not constitute a material alteration of the terms and conditions of her employment. Indeed, the letter is most accurately viewed as upholding the terms and conditions of her employment. Holding otherwise would completely debilitate employers by preventing them from enforcing their internal rules of conduct. Moreover, the letter was not in itself disciplinary. Rather, it merely cautioned Ludwig that further similar conduct would subject her to "potential disciplinary action." (*Id.*)

Finally, Ludwig contends that Northwest management made numerous telephone calls to her home questioning her performance and attendance. The record is completely void of any evidence supporting this contention. Even if proven, such conduct does not constitute adverse employment action. *See Munday v. Waste Management of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir.1997) (holding that an adverse employment action does not encompass a situation in which the employer essentially instructed its employees to harass the plaintiff).

In sum, although Ludwig claims that she has been retaliated against by Northwest, the instances she cites in support of her allegation are either unsupported by the record or insufficient to constitute adverse employment actions. Ludwig admits that throughout the period in question she never received a termination notice or a

Level 1 notice, was never given a decision making leave, and was never coached. (*See* Ludwig Dep. 72-73, 93-95.) Further, the actions in question never affected her salary, duties, or position at Northwest. In other words, the terms and conditions of her employment were never altered. Therefore, the Court finds that Ludwig has failed to make a prima facie case of retaliation. Accordingly, Northwest is entitled to dismissal of this count as a matter of law.

C. Negligence and Intentional Infliction of Emotional Distress

In addition to alleging Title VII and MHRA violations, Ludwig has alleged negligent training, negligent hiring, negligent supervision, and intentional infliction of emotional distress ("IIED"), all under Minnesota law. Northwest argues that Ludwig's common law claims should be dismissed because they are preempted by the MHRA and, in any event, she has not presented evidence in support of her claims.

Notwithstanding the issue of preemption, it is abundantly clear that Ludwig's negligence claims cannot stand. Her negligent training claim fails because Minnesota does not recognize such a theory of recovery. *See Mandy v. Minnesota Mining & Mfg.*, 940 F.Supp. 1463, 1473 (D.Minn.1996) (citing *M.L. v. Magnuson*, 531 N.W.2d 849, 856 (Minn.Ct.App.1995)). Ludwig's negligent hiring and supervision claims likewise fail because she has not alleged the type of injury necessary to maintain such claims, namely, bodily injury or the threat of bodily injury. *See id.* at 1471.

Plaintiff's IIED claim also fails. In order to prevail on such a claim, the plaintiff must establish that: 1) the defendant's conduct was extreme and outrageous; 2) the conduct was intentional or reckless; and 3) it caused severe emotional distress. *See Hubbard,* 330 N.W.2d at 438-439. "The operation of this tort is sharply limited to cases involving particularly egregious facts." *Id.* at 439. Ludwig has not presented such facts here.

In order to be deemed "extreme and outrageous," conduct "must be 'so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community.' " *Id.* (quoting *Haagenson v. Nat'l Farmers Union Property and Cas. Co.,* 277 N.W.2d 648, 652 n. 3 (Minn.1979)). Northwest's actions fall far below this deliberately high standard. Ludwig's alleged emotional distress apparently stems from Northwest's "numerous false accusations, investigations and general harassment." (Pl.'s Mem. at 34.) The Court will assume that Ludwig is referring to the alleged instances of retaliation discussed above. The Court concludes that as a matter of law, these incidences, either individually or collectively, cannot be considered extreme and outrageous. Rather, the conduct complained of constituted Northwest's reasonable investigations into potential security matters and routine communications with its employee. Thus, neither the nature of the actions, nor their content can be viewed as utterly intolerable to the civilized community. *See Hubbard,* 330 N.W.2d at 439-40 (holding that dismissal as a matter of law was appropriate when the conduct constituted no more than employment discipline and written and verbal criticism of the plaintiff's job performance,

even if intended to harass). Indeed, the civilized community would probably prefer that Northwest be overly careful when it comes to airline safety.

Even if Ludwig could establish that Northwest's conduct was extreme and outrageous, there is no proof that she has suffered from "severe emotional distress." The only evidence of any physical reaction to her situation comes from her deposition in which she claims to have experienced emotional upset, distress, loss of reputation, decreased energy, sleeplessness, and the like. (*See* Ludwig Dep. at 97-100.) These symptoms, even if substantiated, do not rise to the level necessary to maintain this claim. Ludwig has never seen a doctor, missed work, or filed a worker's compensation claim as a result of her symptoms. Therefore, it can hardly be said that she suffers from distress "so severe that [she cannot] be expected to endure it." *Id.* at 439. Thus, the Court concludes that as a matter of law, Ludwig has not established the elements necessary to maintain a claim of intentional infliction of emotional distress.

CONCLUSION

For the foregoing reasons, and upon all of the files, records, and proceedings herein, the Court grants Defendant Northwest's Motion for Summary Judgment.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant Northwest Airlines, Inc.'s Motion for Summary Judgment is (Clerk Doc. No. 56) is **GRANTED**; and

2. Plaintiff Susan Ludwig's Complaint (Clerk Doc. No. 1) is **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2258	*	Order Denying Petition
Susan Ludwig,	*	for Rehearing and for
	*	Rehearing En Banc
Appellant,	*	
	*	(Filed Feb. 22, 2001)
v.	*	
	*	
Northwest Airlines, Inc.,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

February 22, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

[LOGO]

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Susan L. Ludwig
P. O. Box 380870
Cambridge, MA 02238

Charging Party

vs.

Northwest Airlines
5101 Northwest Drive
St. Paul, MN 55111-3034

Respondent

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge.

The Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*, and timeliness, deferral, and other requirements for coverage have been met.

The Charging Party alleges that she was discriminated against in violation of Title VII of the Civil Rights Act of

1964, as amended. The Charging Party alleges that she was discriminated against on the basis of her gender/ female and in retaliation for her complaint that there was gender discrimination in the 1994 pilot hiring process. The Charging Party alleges that she was discriminated against and retaliated against when she was denied the opportunity to interview, denied the opportunity to take the simulator test for the position of pilot, harassed, treated differently than her male co-workers during the pilot hiring process, and notified on November 28, 1995, that she would not be considered for the pilot position.

Examination of the evidence, both documentary and testimonial, indicates that there is reasonable cause to believe that violations of the statutes have occurred. The Respondent discriminated against the Charging Party by applying screening criteria during the 1995 internal pilot hiring process to her that was different than that applied to her male co-workers who were promoted to the pilot position.

The evidence establishes that the Charging Party is a forty-five year old White female union employee who has been employed with the Respondent since January 1974. Evidence supports the conclusion that the Charging Party, Susan Ludwig, was not promoted to the pilot training program positions open in 1995 because of her gender. Evidence establishes that the Respondent promoted less qualified male co-workers to the pilot training program positions open in 1995. Evidence establishes that during the 1995 pilot hiring process, the Charging party held a valid Air Transport Pilot License, a full Flight Engineer Certificate, had completed over 1800 hours of flight time as a pilot or second in command, and was

more qualified or as qualified in the areas of attendance and job performance than the successful male candidates.

I therefore conclude that the Respondent, willfully, and with reckless disregard of the requirements of the law, discriminated against the Charging Party as alleged.

Based on the evidence as outlined above, I recommend that the Commission issue a reasonable cause finding that the Charging Party was discriminated against on the basis of her gender.

I have determined that the evidence obtained during the investigation does not establish violations as to the following: Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes that the Charging Party was retaliated against for her complaints of gender discrimination in the 1994 internal pilot hiring process. This does not certify that the Respondent is in compliance with the statues. [sic] No finding is made as to any other issues that might be construed as having been raised by this charge.

Section 706(b) of Title VII requires that if the Commission determines that there is reason to believe that violations have occurred, it shall endeavor to eliminate the alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion. Having determined that there is reason to believe that violations have occurred, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. An EEOC representative will be in contact with each party in the near future to begin the conciliation process. Disclosure of information obtained by the

Commission during the conciliation process will be made in accordance with Section 706(b) of Title VII and Section 1601.26 of the Commission's Procedural Regulations. If the Respondent declines to enter into settlement discussions, or if for any other reason the Commission's representative is unable to secure an acceptable settlement, the Director shall so inform the parties in writing and advise them of the court enforcement alternative available to the charging party, aggrieved persons, and the Commission.

On behalf of the Commission,

February 4, 1998 — /s/ Michael J. Bloyer
Date — Michael J. Bloyer
Area Director

(2)

Supreme Court, U.S.
FILED
JUL 2 2001

No. 00-1768

In the
Supreme Court of the United States

Susan Ludwig,

Petitioner,

v.

Northwest Airlines, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR NORTHWEST AIRLINES, INC. IN OPPOSITION

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29 pp

QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's conclusion that the petitioner failed to rebut respondent's showing of non-discriminatory intent, lack of pretext and business purpose to its decision to reject petitioner's application to become an airline pilot, thereby compelling summary judgment under *McDonnell Douglas*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Northwest Airlines, Inc. makes the following disclosure:

1. Northwest Airlines, Inc. is an indirect, wholly owned subsidiary of Northwest Airlines Corporation, a Delaware corporation. Northwest Airlines Corporation is publicly held.

2. Based on a Schedule 13G filed with the Securities and Exchange Commission, AXA Financial Inc., a wholly-owned subsidiary of AXA, a publicly-held French holding company, is the only publicly-held company that owns ten percent or more of Northwest Airlines Corporation stock.

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Respondent Northwest Airlines, Inc. asks this Court to deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The court of appeals decision (Pet. App. A-1 – A-2) is reported as a table decision at 242 F.3d 376 (8th Cir. 2001). The full, unpublished affirmance is available on Westlaw at No. 00-2258, 2001 WL 10908 (8th Cir. Jan. 5, 2001). The district court opinion (Pet. App. A-3 – A-30) is reported at 98 F. Supp. 2d 1057 (D. Minn. 2000).

JURISDICTION

The court of appeals entered judgment on January 5, 2001, and denied Ludwig's petition for rehearing *en banc* on February 22, 2001. Pet. A-31. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Nominally an employment case, Northwest Airlines' decision not to make Susan Ludwig a pilot intimately involved airline safety. Ludwig's non-selection was no accident and certainly not pretextual. Northwest Airlines is obliged by law to conduct flight operations with "the highest possible degree of care." 49 U.S.C. App. § 1421(b). The Federal Aviation Administration (FAA) applies this statutory directive specifically to pilot hiring. By FAA rule, airlines are required to consider all "personal characteristics that could adversely affect safety in pilot decisions." 14 C.F.R. § 121.413(a)(4)(ii) (2001).

Congress recently strengthened the airlines' ability to assess applicants by enacting the Pilot Records Improvement

Act of 1996, P.L. 104-264, Title V, 110 Stat. 3213, 3259-63, *amending* 49 U.S.C. § 44936. This legislation responded to a fatal air crash that was attributed to ineffective screening of new hires; then-existing law blocked a prospective employer's access to a candidate's prior work history. *See* HOUSE COMM. ON TRANSPORATION, AIRLINE PILOT HIRING AND SAFETY ACT OF 1996, H. Rep. No. 104-684, at 4-5 (1996). The new statute mandated the disclosure of a pilot's work history to prospective employers. Against this statutory and regulatory backdrop, Northwest Airlines conducted the selection process that this petition now seeks to attack.

In 1994, after a four-year hiring hiatus, Northwest Airlines launched a new pilot recruiting and selection program. Hoping to add approximately 400 pilots, the airline looked first to internal candidates. Ludwig washed out of the 1994 class. She was excluded after "decisively fail[ing] the simulator test."[1] Pet. A-6. All incumbent employees who survived the screening process were hired.

In 1995, Northwest Airlines' hiring needs again exceeded the available pool of internal applicants. As a result, every internal applicant who successfully demonstrated their qualifications received an offer. Consistent with its overarching safety obligations, Northwest Airlines rigorously reviewed all applicants. Undeterred by her previous missteps, Ludwig tried again to secure a pilot's job.

The 1995 internal selection process began by eliminating all applicants who lacked minimum qualifications, such as continuity of service, certificates, ratings and flight experience. A500. Ludwig failed the continuity of service

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[1] Ludwig performed erratically in her simulator test, staying behind the aircraft and compounding her erratic handling through over-control. Besides extremely poor flying performance, she failed to use crew members as necessary or call for an approach briefing. A709-11. Because she failed the first phase of the application process in 1995, Ludwig did not take a flight simulator test as part of her 1995 application.

qualification, but Northwest Airlines waived that provision for her. Pet. A-6 n.4, A426. Candidates who passed this minimal screening proceeded to a multiple choice test – the Multidimensional Aptitude Battery – and an employment history check. A501-02. Another paper and pencil assessment known as the Personal Characteristics Inventory (PCI) was also administered, but ultimately not used. A501.

This selection process was designed to find applicants who had demonstrated good crew resource management (CRM) skills.[2] A395 A502. As part of its search for qualified internal applicants, Northwest Airlines scrutinized applicants' backgrounds. The background check consisted of inquiries to the FAA, the National Driver Records Database and other sources. A390. Additionally, Northwest Airlines pulled each applicant's personnel file and questioned each applicant's supervisors. A421, A502. Northwest Airlines also evaluated attendance. A502. Absenteeism is a serious industry concern; if pilots do not report for work, flights are canceled. An airline's reliability and on-time performance record are critical to customer satisfaction and economic success.

Ludwig makes much of the company's decision to substitute a detailed background check for a multiple choice inventory of personality traits. But the undisputed record establishes that the decision was made without regard to the PCI test results and undertaken for a sound business reason – "[P]ast behavior is a very good predictor of future behavior." Pet. App. A-17. Simply put, an airline that selected a pilot without looking at available work history information would

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[2] CRM skills cover a range of cockpit-related performance. These skills are important to safe airline operations – the FAA and the National Transportation Safety Board have attributed a significant percentage of aviation accidents to failures in CRM skills. Pet. App. A-5 n.3. It was undisputed that CRM skills are critical to safe piloting and include, for example, the ability of a pilot to lead effectively and to work as a team in the cockpit and with air control. A606-08.

be ignoring critical information. Scrutiny of personnel records is exactly what Congress provided for when enacting the Pilot Records Improvement Act.

Ludwig's background check undisputedly revealed significant attendance and performance problems. Ludwig's track record was punctuated by excessive sick calls and frequent leaves of absence. A502-03, A518. Moreover, her file was littered with incidents that exhibited poor CRM skills: ineffective communication, a lack of cooperation and teamwork and failure to use other crew members. A502-03, A518, A601-02, A709-11.

Based upon her employment record, Northwest determined that "[Ludwig's] attendance, work ethic, and behavioral problems with internal and external customers, [were] a problem . . . she would not make a reliable, safe crew member in the cockpit flying Northwest Airline[s] aircraft." A430-31. Significantly, Ludwig does not dispute that the incidents in question occurred or that her files and supervisors revealed the behaviors that lead to her non-selection. Given its statutory mandate to operate with the "highest possible degree" of care, Northwest Airlines declined to put Ludwig into the cockpit.

After failing to make the cut a second time, Ludwig filed charges with the EEOC and subsequently sued in federal district court. Her complaint alleged disparate impact and retaliation claims in violation of Title VII.[3] Pet. A-8. In a carefully reasoned opinion, Chief Judge Magnuson entered summary judgment. Ludwig's Title VII (disparate treatment) claim, was analyzed pursuant to the three-step test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Pet. A-9 – A-15. Ludwig met the minimal objective criteria, Pet. A-11, but the legitimate nondiscriminatory reasons for Northwest's action were unrebutted. Pet. A-12. In addition,

[3] The retaliation claim is not part of Ludwig's petition.

the district court found that Ludwig's pretext evidence did not pass muster under *McDonnell Douglas*. Pet. A-12 – A-15.

The district court similarly dissected Ludwig's disparate impact claim. Again, Ludwig's evidentiary showing was held wanting. Pet. A-15 – A-19. For Ludwig's benefit the court assumed a prima facie case. Pet. A-16. But Northwest Airlines' reliance on job performance history was justified by business necessity. Pet. A-16 – A-17. Without evidence to the contrary, the Title VII disparate impact claim also failed.

The court of appeals readily affirmed for the reasons stated in the district court's "thorough opinion." Pet. App. A-2.

ARGUMENT

I. Ludwig waived her first question by failing to argue it below.

In the first question presented to this Court, Ludwig asserts that an EEOC probable cause determination should preclude summary judgment. Moreover, she contends that the court of appeals disregarded the administrative finding in affirming summary judgment. To buttress this argument, Ludwig infers a circuit split regarding the evidentiary significance of an EEOC determination. Because the Eighth Circuit failed to discuss the EEOC's determination of probable cause, Ludwig suggests that the agency's action was accorded no probative value. This first question deserves no consideration here because the issue was neither presented to nor addressed by the lower courts.

Both decisions below are silent regarding the deference paid to the EEOC's determination. This silence is unsurprising; Ludwig only obliquely mentioned the administrative treatment of her charge below. Before the district court, Ludwig referenced the determination in her factual statement, but never argued its significance.

Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 1,15, 16-22. Before the court of appeals, Ludwig briefly noted the EEOC finding in her summary of the case and factual statement, *see* Appellant's Brief and Addendum at i and 26-27, but in her issues presented and her legal argument, Ludwig was silent on the subject, *see id.* at vi-vii, 33-53. Ludwig's reply brief suggests that the EEOC determination somehow indicated disparate treatment, but that assertion was simply one of 11 examples of alleged discrimination. *See* Appellant's Reply Brief and Addendum at 23-27.

Ludwig never argued, as she suggests now, that the probative value of an administrative agency finding trumps a federal court's authority to grant summary judgment. Consequently, the first question cannot be raised in this certiorari petition. *See, e.g., Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) ("that question was not raised in the court of appeals and is not properly before us").

Nor is there merit to Ludwig's first issue. *Reeves* did not propound a new standard judgment standard. Rather, that case simply clarified what a trial rule should review when addressing a Rule 50 motion for judgment as a matter of law. *See Reeves*, 530 U.S. at 149-50. The Court noted that the summary judgment process involves the same standard applied to the record as a whole. *Id.* at 150.

As set out in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and its companion cases, summary judgment is an integral part of the Federal Rules as a whole, which are designed to secure "'the just, speedy, and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1). Summary judgment involves a multi-step process, with the moving party bearing the burden of showing there are no genuine issues of material fact and that it is entitled to judgment in its favor as a matter of law. *Id.* at 323. The party opposing summary judgment cannot rest on allegations or simple denials, but must put forward

specific, affirmative and admissible facts that show there is a genuine issue of disputed fact for trial. *Id.* at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S, 242, 256-57 (1986). Ludwig failed in this essential step – her response was simply her argument and unsupported assertions. *See* Pet. A-12 – 13.

Ludwig does not show any apposite authority to support her first question. Indeed, she cites no authority of this Court or any other court for the proposition that an EEOC probable cause determination automatically creates a disputed fact issue. Rather, the contrary is the case. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1283-84 (9th Cir. 2000). No. 00-1560, *cert. denied sub. nom. Gentile v. Quaker Oats Co.*, (July 2, 2001). EEOC reports are hardly uniform and vary widely in quality and detail. S*ee Johnson v. Yellow Freight Sys., Inc.*, 734 F.2d 1304, 1309 (8th Cir.), *cert. denied*, 469 U.S. 1041 (1984). Like the finding in this case, such determinations frequently rest on conclusory statements. Too often the underlying facts and the weight afforded to the evidence presented are not revealed by the administrative record. *Coleman*, 232 F.3d at 1284;[4] *see also Gillin v. Federal Paper Bd. Co., Inc.*, 479 F.2d 97, 99 (2d Cir. 1973) (EEOC investigatory file was a "'mish-mash of self-serving and hearsay statements and records'") (quoting district court). Because the federal courts remain the ultimate, independent arbiters of Title VII claims, *Tulloss v. Near N. Montessori*

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[4] Ludwig suggests that *Gifford v. Atchison, Topeka and Santa Fe R. Co.*, 685 F.2d 1149 (9th Cir. 1982), and *Plummer v. Western Int'l Hotels Co., Inc.*, 656 F.2d 502 (9th Cir. 1981) are contrary to *Coleman*. But those cases were decided well before *Coleman*. Moreover, *Gifford* and *Plummer* are easily reconciled with *Coleman*: under Ninth Circuit precedent, EEOC determinations are *per se* admissible, but consistent with the rule that Title VII cases are tried *de novo* in the federal courts, *see* text, *infra* at 9-10, the evidentiary weight of an EEOC report is left to the district court in the first instance. Thus, even if an EEOC determination may be probative, as recognized in *Gifford* and *Plummer*, the *Coleman* decision holds a Title VII claim is still subject to summary judgment.

Sch., Inc., 776 F.2d 150, 154 (7th Cir. 1985), even summary judgment against the EEOC may be granted. *See, e.g., EEOC v. Insurance Co. of N. Am.*, 49 F.3d 1418 (9th Cir. 1995).

Having failed to support the bald proposition embraced by her first question, Ludwig changes tack to argue an apparent circuit conflict regarding the probative value of an EEOC determination. The cited authorities, however, do not reflect any meaningful circuit conflict. All agree that an EEOC report may, in the appropriate circumstance, be afforded probative value. The only difference among the various cases is two admissibility standards: a *per se* rule, such as articulated in *Heyne v. Caruso*, 69 F.3d 1475, 1483 (9th Cir. 1995) and *Smith v. Universal Servs., Inc.*, 454 F.2d 154, 157-58 (5th Cir. 1972);[5] and a rule that leaves the question of admissibility to the sound discretion of the trial court, as adopted in *Paolitto v. John Brown E. & C., Inc.*, 151 F.3d 60, 65 (2d Cir. 1998), *Hall v. Western Prod. Co.*, 988 F.2d 1050, 1057-58 (10th Cir. 1993) and *Barfield v. Orange County*, 911 F.2d 644, 650 (11th Cir.1990).[6] If there is a circuit conflict on admissibility, the difference as the Seventh

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[5] *But cf. McClure v. Mexia Indep. Sch. Dist.*, 750 F.2d 396, 400 (5th Cir. 1985)(an EEOC report may be excluded under Fed. R. Evid. 803(8)(C) if there are indications of untrustworthiness).

[6] Ludwig also cites *Williams v. Nashville Network*, 132 F.3d 1123 (6th Cir. 1997) and *Walker v. Nationsbank of Florida, N.A.*, 53 F.3d 1548 (11th Cir. 1995), as nominally supportive. But in each case the courts followed the majority view. Each decision also affirmed the exclusion of an EEOC report. *See Williams*, 132 F.3d at 1129; *Walker*, 53 F.3d at 1554-55.

Ludwig also cites an unpublished decision from the Tenth Circuit, *Cervantes v. Wal-Mart Stores, Inc*, 242 F.3d 387 (10th Cir. 2001) (Table), No. 00-1058, 2001 WL 8305 (10th Cir., Jan. 3, 2001). There, the appellate court reversed summary judgment in favor of the employer, because sufficient evidence had been proffered to infer pretext. *Id.* at *4. The Tenth Circuit did not base its reversal on the EEOC's probable cause finding.

Circuit recognized, is largely "academic" and without practical significance. *Tulloss,* 776 F.2d at 153.

Following the majority view, the Eighth Circuit leaves the question of admissibility to the trial court. *Johnson,* 734 F.2d at 1309. *Johnson* obviously indicates that the Eighth Circuit considers EEOC determinations as potentially probative, but the trial court must initially address admissibility under Fed. R. Evid. 403. Whether the district court below should have explicitly addressed Ludwig's EEOC report simply is not a question of national significance. *See* Sup. Ct. R. 10(c); *cf. Blizard v. Fielding*, 572 F.2d 13, 16 (1st Cir. 1978) ("Mere failure of the court in this instance to make reference to the EEOC findings is not sufficient to sustain an allegation of prejudicial error.").

Ludwig's suggestion that EEOC determinations should be given *res judicata* effect mischaracterizes the nature of those determinations.[7] An EEOC determination bears none of the hallmarks of adjudicative decision-making. Instead EEOC findings are based upon written submissions and ex parte interviews. Neither the complainant nor the employer can cross-examine witnesses. *See Tulloss, 776* F.2d at 154, *Smith*, 454 F.2d at 160-61 (Dyer, J.) (dissenting from denial of petition for rehearing en banc). And contrary to what Ludwig suggests by her *University of Tennessee v. Elloitt*, 478 U.S. 788 (1986) citation, Congress specified the federal courts as the final authority to decide Title VII claims. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 and 60 n. 21 (1974). Thus, Title VII claims are tried *de novo* in federal courts – neither the employee nor the employer is bound by

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[7] Ludwig's citation on this point to Justice Blackmun's dissent in *Kremer v. Chemical Constr. Co.*, 456 U.S. 461 (1982), is both misleading and inexplicable. Justice Blackman is misquoted – his reference to a probable cause standard was not to an EEOC determination – but merely to a state agency determination involving a housing discrimination charge under state law. *See id.* at 507 n.22 (quoting *Goldberg v. State Comm'n for Human Rights*, 54 Misc. 2d 676, 680, 283 N.Y.S. 2d 347, 352 (1966)).

the agency's determination. *See Chandler v. Roudebush*, 425 U.S. 840, 844-45 (1976). Carried to its logical extreme, Ludwig's argument would require summary judgment against every Title VII plaintiff who failed to secure a probable cause determination from the EEOC.

In short, there is no circuit conflict regarding whether an EEOC determination precludes summary judgment or any meaningful conflict about the probative value of EEOC determinations. In any event, since the issue was not raised below, this is not the case in which to address such a minor evidentiary issue.

II. The Court of Appeals considered and rejected Ludwig's *Reeves v. Sanderson Plumbing Products, Inc.* argument.

For her second question, Ludwig insists that review is warranted because *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) was not followed. This argument is premised on the timing of the district court's decision, which predated *Reeves*, and the court of appeals' affirmance, which is based upon the district court's "thorough opinion." Pet. A-2. Without citing Sup. Ct. R. 10(a) or 10(c), Ludwig seems to be invoking this Court's supervisory function, supposedly to correct a lower court's mistake. But this case presents nothing more than a fact-bound inquiry into whether well established summary judgment standards were correctly employed. Certiorari jurisdiction does not exist to correct errors below, but rather to address issues of recurring and national significance. Nothing in Ludwig's second question merits this Court's plenary review.

The decisions below faithfully applied Fed. R. Civ. P. 56(c) and (e) to the undisputed facts. While the district court's decision did not have the benefit of this Court's guidance in *Reeves*, there is no inconsistency between the two decisions. *Reeves* did not establish new rules for deciding

Title VII summary judgment motions. Instead, *Reeves* reiterated the existing standard that ". . . the court must review the record 'taken as a whole.'" 530 U.S. at 150 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).[8] There is nothing new about this directive. Ludwig acknowledged as much in her Eighth Circuit pleadings. *See* Appellant's Brief and Addendum at 31 and 33.

In his Rule 56 disposition of Ludwig's claims, Chief Judge Magnuson did not depart from the admonitions of *Reeves*. The district court did not weigh the facts to find Northwest's position more persuasive. Rather, the opinion concluded that Ludwig failed to proffer evidence, as opposed to unsupported, conclusory allegations, to rebut Northwest Airlines' showing. For example, the district court observed: "Ludwig has supplied the Court with voluminous documentation about the other applicants, most of which is either indecipherable or unsupportive of her position." Pet. A-13 (emphasis added). Similarly, the court assessed Ludwig's proffer as follows: "Again, neither of these statements are anything more than bald accusations, wholly conclusory and unsupported by the record." *Id.*; *see also* A-12 – A-13 ("This averment, however, is not supported by the record.").

Moreover, Ludwig misapprehends the message of *Reeves*. That case does not create a shield against summary judgment. On the contrary, this Court observed:

> Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude

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[8] The Court also observed that ". . . the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves*, 530 U.S. at 150 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986))

> that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law . . . if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Reeves, 530 U.S. at 148. Continuing, the Court discussed the factors which also guide summary judgment analysis:

> Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.

Id. at 148-49.

The district court was presented with a complete lack of evidence about pretext and uncontroverted proof regarding the reasons for Ludwig's non-selection. Ludwig failed twice to rebut Northwest Airlines' non-discriminatory explanation for its action. Evidence of pretext, moreover, was literally lacking. Pilots with bad CRM skills may put lives at risk. Undaunted, Ludwig presses her case a third time to this Court, referencing several examples of what the district court did not explicitly address. But her argument is nothing more than a rehash of the record on which the district court granted summary judgment and the court of appeals affirmed.

In particular, Ludwig argues about certain facts that the district court supposedly ignored. According to Ludwig, the district court's silence on these points renders summary judgment improper. Ludwig's assertions are not organized coherently by claim, so they will be addressed seriatim.

Failing to address that the female pass rate for the PCI test was higher than males. (Pet. 9.)

Failure to address the male pass rate for the PCI.

Failing to discuss the decision to use a background check over the PCI test.

The district court discussed these contentions and rejected them as legally unavailing. *See* Pet. A-6 – A-7 and A-1 and n.5.

Failing to address that Ludwig took her leaves pursuant to company rules and was never disciplined for excessive leave.[9] (Pet. 9.)

The district court unquestionably addressed attendance. Pet. A-3 – A-4, A-13. In any case, Northwest Airlines waived the continuous service requirement for Ludwig; otherwise her excessive leave – whether permitted or not – would have disqualified her. Pet. A-6 n.4.

Failing to address that two males besides Ludwig failed the 1994 simulator test. (Pet. 10-11.)

This fact is immaterial. Ludwig sued over her disqualification from the 1995 class, not the 1994 class. Pet. A-7.

Failing to address Ludwig's license status and hours of flight experience. (Pet. 11.)

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[9] Ludwig claims her leave was to attend Harvard's night extension school. The exhibit Y she cites in support makes no reference to her grade point average or to her "masters" program or thesis.

These were the minimal qualification for pilot candidates that the district court must have considered in sustaining Ludwig's Title VII prima facie case.

> Failing to discuss that the PCI was designed to assume applicants had the necessary skills to fly safely. (Pet. 11.)

The district court did discuss the PCI. Pet. A-6. Likewise, the court addressed the reason why Northwest Airlines always intended to conduct background checks – a background check was much more reliable. Pet. A-7. Because Ludwig could not dispute this fact, Northwest Airlines could show both lack of pretext and business necessity, regardless of the PCI. Pet. A-13 – A-14.

> Failing to address that the PCI was used for external applicants. (Pet. 12.)

This fact is also immaterial – Ludwig was evaluated as part of the internal applicant pool, all of whom would be offered a pilot training opportunity if they passed the initial evaluation. In any event, Northwest Airlines was unable to secure detailed background information on external applicants. The congressionally mandated release of employment history information for pilot applicants did not occur until 1996. But for internal applicants, Northwest had ready access to important data that related to their pilot qualifications.

> Failing to discuss that five male applicants who passed the background check also had discipline or performance issues.[10] (Pet. 12.)

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[10] Indicative of the unsupported nature of her argument, Ludwig introduces a red herring – Norman Prouse, who was, as Ludwig noted,

Plainly, Ludwig's second question is nothing more than an attempted reevaluation of the record before the district court. Facts that Ludwig says were ignored were either addressed or are immaterial. The district court was, moreover, well within its discretion in choosing which particular pieces of evidence to comment upon. *Blizard*, 572 F.2d at 15-16.

Concluding, Ludwig asserts that "*Reeves* is of no effect if the lower courts ignore it." Pet. 12. The contention that *Reeves* was ignored is an affront to the Eighth Circuit, which has had no difficulty applying *Reeves*. *See, e.g., Wilcox v. State Farm Mut. Auto. Ins. Co.*, ___ F.3d ___, ___, No. 00-2516, 2001 WL 649052, at *2 (8th Cir. June 11, 2001); *Tatom v. Georgia-Pac. Corp*, 228 F.3d 926, 931-32 (8th Cir. 2000).[11]

In short, Ludwig's *Reeves* argument involves nothing more than whether she successfully rebutted the evidence that her application was rejected because she was unfit to perform a pilot's duties, which involve responsibility for the lives of the crew and passengers. Whether the courts below were correct in their assessments is not a decision worthy of certiorari. No circuit conflict on this point could possibly exist; indeed, while admittedly nonprecedential, during this

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convicted of flying while intoxicated. But Prouse rehabilitated himself and earned back his wings, as well as a presidential pardon. *Spes vincent thronum.* Prouse was not part of Ludwig's 1995 class, and hence, whatever happened to him was irrelevant to Ludwig's claim.

[11] Use of West Group's KeyCite program yields a total of 24 Eighth Circuit decisions citing *Reeves*. In one of these cases, an argument similar to what Ludwig asserts with the first question was addressed. The Eighth Circuit observed that, while "Eighth Circuit law [was] displaced by *Reeves*, the district court's decision is in keeping with the *Reeves* decision." *Becker v. ABB Power T&D Co., Inc.*, ___ F.3d ___ (8th Cir. 2001) (Table) No. 00-2519, 2001 WL 388854, at *1 (Apr. 18, 2001). Had Ludwig presented her first issue to the court of appeals, the same observation would have undoubtedly been made.

term the Court has repeatedly refused to review the Eighth Circuit's application of *Reeves*.[12]

III. The district court properly held that Ludwig failed to show pretext.

For her final question, Ludwig argues that the district court, and by implication, the court of appeals, gave undue deference to Northwest Airlines' safety rationale. According to Ludwig, her employment record should have played no part in the assessment of the qualifications to be a pilot. By giving credence to Northwest Airlines selection process, Ludwig contends that the district court usurped the jury's role of determining whether the use of a background check was pretextual. Ludwig cites no basis in this Court's rules for granting certiorari on this issue. In any case, the entire argument is misplaced; the district court properly applied the *McDonnell Douglas* standards. That analysis compelled summary judgment in Northwest's favor. More importantly, there is also no circuit conflict regarding an airline's obligations to consider safety when pilots are hired.

It is beyond peradventure that the district court conducted a proper analysis under the *McDonnell Douglas* framework. The district court accepted Ludwig's prima facie case of discrimination. Pet. A-11. Turning to the second step, the district court found that the airline had shown legitimate non-discriminatory reasons for Ludwig's non-selection – ". . . high absenteeism, low CRM skills, troublesome attitude, and poor performance." *Id.* A-12.

The district court then focused on the dispositive issue of pretext. In finding that Ludwig failed to show pretext, the

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[12] *Dionne v. Thompson*, 00-468 *cert. denied* Feb. 20, 2001, 69 USLW 3284 and 3552; *Ward v. Heritage Media Corp.*, 00-583, *cert. denied* Jan. 8, 2001, 69 USLW 3321 and 3456; *Lawrence v. University of Missouri*, 00-171, *cert. denied* Oct. 10, 2000, 69 USLW 3146 and 3257.

district court did not weigh evidence or make a factual determination. Instead, Ludwig's failure to offer evidence of pretext was noted. Ludwig's case was reduced simply to conclusory arguments that were unsupported by the record. *Id.* A-12 – A-13.

Ludwig continues in the same vein here, decreeing that a multiple choice personality test is better than a detailed scrutiny of her work history as a flight attendant. But the argument is simply Ludwig's opinion, unsupported by any competent evidence and thus, insufficient to rebut Northwest Airlines' showing that a background check more accurately predicted a potential pilot's cockpit performance. Given the utter lack of evidence to the contrary, the district court very correctly granted Northwest Airline's summary judgment motion. None of the authorities Ludwig cites with question three suggest otherwise, each involving simply a fact bound review of whether summary judgment was proper or the evidence supported the jury's verdict.[13]

There is, moreover, no doubt that air carriers are legally bound to consider indicators of pilot performance in deciding who should be staffing the cockpit. Few jobs in this country implicate the lives and well being of as many people as that of a pilot. Congress requires air carriers to operate with "the highest possible degree of care." 49 U.S.C. § 44702(b)(1)(A).

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[13] *Nunez v. Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978), was an action to cancel mineral leases and principally involved a discussion of which issues in the case were equitable and which were legal. *Id.* at 1126-28. In *Walker v. Thompson*, 214 F.3d 615 (5th Cir. 2000), the court of appeals simply reversed a grant of summary judgment, because the appellate court was persuaded differently about whether the employees had created a "genuine issue of material fact" on their employer's affirmative defenses to their hostile work environment claim. *Id.* at 626. *Rizzo v. Children's World Learning Ctrs*, 213 F.3d 209 (5th Cir.), *cert. denied*, ___ U.S. ___, 121 S. Ct. 382 (2000), involved an appeal from a jury verdict in favor of the employee. The central issue was whether an unobjected to jury instruction constituted reversible, plain error, an issue hardly relevant to Ludwig's third question. *Id.* at 212-13.

The FAA has likewise mandated consideration of pilot candidates "personal characteristics that could adversely affect safety" when selecting pilots. 14 C.F.R. § 121.413(a)(4)(ii). This Court has also recognized that "the central mission of the airline's business [is] the safe transportation of its passengers." *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991) (citing *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985)). And with the 1996 legislation, Congress mandated a background check into pilot applicants. 49 U.S.C. § 44936(f)(1) ("Before hiring an individual, an airline shall request and receive the following information:") In view of these obligations, Northwest Airlines very properly availed itself of all available sources of information, including a background check to assess Ludwig's qualifications. Indeed, failing to take advantage of highly predictive performances data that were readily at hand would arguably have been negligent, if not foolhardy.

Extraordinary safety considerations have regularly been applied in airline employment cases. The case relied on by the district court, *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982), held that an air carrier's overriding safety obligations made a pilot age limit a bona fide occupational qualification (BFOQ). *Id.* at 101. The Fifth Circuit also rejected an EEOC challenge to the same carrier's revised age-based pilot hiring policy, again on a safety rationale. *EEOC v. American Airlines, Inc.*, 48 F.3d 164, 170-71 (5th Cir. 1995). In upholding the age-based guideline, the Fifth Circuit rejected the EEOC's argument that *Western Air Lines v. Criswell*, 472 U.S. 400 (1985), changed applicable law to proscribe reliance on safety considerations, noting that this Court had expressly approved

the possibility that safety considerations could sustain age as a BFOQ. *Id.* at 170.[14]

Other appellate courts have similarly cited air carriers' safety obligations in affirming age or medically related hiring standards. *Coupé v. Federal Express Corp.*, 121 F.3d 1022, 1025 (6th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998) ("Safety, in our view, goes 'to the core' of an aircraft pilot's performance.") (quoting *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991)); *Robinson v. American Airlines, Inc.*, 908 F.2d 1020, 1023-24 (D.C. Cir. 1990) (height/weight and blood pressure guidelines upheld); *Johnson v. American Airlines, Inc.*, 745 F.2d 988, 991-93 (5th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) (age 60 retirement for all flight officers upheld). *Cf. EEOC v. Missouri State Highway Patrol*, 748 F.2d 447, 456-57 (8th Cir. 1984) *cert. denied*, 474 U.S. 828 (1985) (upholding state mandatory age 60 retirement for performance and health reasons, and noting that Congress had mandated an age 55 retirement for federal law enforcement personnel).

The district court plainly and correctly applied the *McDonnell Douglas* analysis. The burden of establishing that its pilot hiring criteria were not mere pretext was imposed on Northwest Airlines. The airline carried its burden, and Ludwig failed to respond with probative evidence to the contrary. The district court's reference to Northwest Airlines' safety mandate – which the lower courts have uniformly recognized – merely buttressed the decision. The assessment of pretext would have been regardless of the airline safety discussion. Nothing in the district court's application of *McDonnell Douglas* usurped the jury's role – Northwest Airline's showing was unrebutted, while Ludwig merely

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[14] Indeed, the *Murnane* decision was cited with approval in *Criswell*, with the proviso that the burden of establishing an age-related BFOQ rested with the employer. *Criswell*, 472 U.S. at 419 & n.29.

failed the burden Fed. R. Civ. P. 56(e) imposes. Thus, Ludwig's third question simply falls away.

CONCLUSION

The court of appeals correctly applied Rule 56 summary judgment standards. Ludwig disagrees with the result, but cannot coherently explain how the court of appeals' affirmance was flawed or inconsistent with this Court's decision in *Reeves*. Because Ludwig raises no issue worthy of certiorari review, her petition should be denied.

Dated: July 2, 2001

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No. 00-1768

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In The

Supreme Court of the United States

SUSAN LUDWIG,

Petitioner,

v.

NORTHWEST AIRLINES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO NORTHWEST AIRLINE'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY TO RESPONDENT'S "STATEMENT OF FACTS"

Respondent cites *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), but has no intention of following it. Its "Statement of the Case" contains three pages of facts, all in violation of *Reeves*, since only facts favoring the movant are cited and facts favoring the non-movant are ignored. Indeed, Respondent moved one step beyond ignoring *Reeves*, since it claims the existence of facts contrary to the uncontradicted facts. The very first sentence under Respondent's "Statement of the Case" references "Northwest Airlines' decision not to make Susan Ludwig a pilot . . . ".

But the uncontradicted fact is that Susan Ludwig already is a pilot, holding an Airline Transport Pilot's license, the "final step and the ultimate commercial flying license",[1] and also holds a flight engineer turbo jet rating. App. A; Exhibits "F" and "Y". Since Petitioner was the only candidate holding both the airline transport pilot's license, and the flight engineer rating, her objective qualifications surpassed that of every single male candidate. Respondent was able to disqualify her only by adding a new subjective qualification ("background") after female candidates, including Petitioner, passed the Respondent's objective "pilot personality" tests, at a far higher rate than did the male applicants, Emeott depo., pp. 24-25.

If Respondent intended to pay any attention to *Reeves*, it would have never stated that the fact that at least two of the many males who failed the simulator test

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[1] Cronin, John, *Your Flight Questions Answered: By a Jetliner Pilot*, Plymouth Press: Vergennes, VT, 2000.

in 1994, but then went on to pass the simulator test in 1995 "was immaterial", Respondent's Brief in Opposition, p. 13.[2] Respondent had just argued, at length, that since Ludwig had "washed out of the 1994 class" it was good enough grounds to reject Ludwig in 1995.[3]

The fact that Respondent, like the courts below, is unwilling to follow *Reeves* by stating the facts favoring the non-movant is a good enough reason why this Court should exercise its supervisory powers to reverse this case so as to demonstrate that this Court's precedents must be followed.

REPLY ARGUMENT I.

THE CIRCUITS ARE IN CONFLICT AS TO WHETHER AN EEOC DETERMINATION OF REASONABLE CAUSE CREATES AN ISSUE OF FACT, AND THIS ARGUMENT WAS NOT "WAIVED" BY FAILURE TO RAISE IT BELOW.

Hoping to avoid the question of whether it is appropriate to grant summary judgment for an employer when the EEOC has found the employer had "willfully and with reckless disregard for the requirements of law, discriminated against the charging party as alleged . . . ",

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[2] Although at least thirty (30%) percent of Northwest's internal applicants failed the 1994 flight test given in a DC9 simulator, only two out of thirty-two internal applicants (6%) failed the flight test in 1995 given in a 747 simulator (EEOC Exhibit CC; Emeott affidavit).

[3] In 1995, even though Ludwig passed the written objective pilot tests for Northwest that many males had failed, she was not allowed to proceed to the flight simulator test and final panel interview.

App. 34, Respondent urges that Petitioner "failed to argue the significance of the EEOC finding below". In fact, Respondent's petition for rehearing brought the Appeals Court's attention to Petitioner's "reasonable cause determination", and cited *Gifford v. Atchison, Topeka and Santa Fe Ry. Co.*, 685 F.2d 1149 (9th Cir. 1982), for its holding that a "reasonable cause determination from the EEOC creates an issue of fact". Petition for Rehearing and Rehearing en banc, p. 6.[4]

Contrary to Respondent's Brief in Opposition, p. 9, Petitioner does not contend "EEOC Determinations should be given res judicata effect". Rather, Petitioner's argument is that such determinations are sufficient to avoid summary judgment absent a demonstration that the EEOC's fact-finding is unreliable. Justice Blackmun noted in *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982) that Plaintiff must "present more proof to establish probable cause than to survive summary judgment in federal court". Respondent is correct that Justice Blackmun was referring to a *state* administrative probable cause determination, not an EEOC determination. However, this does not refute the point that an administrative agency's finding of probable cause of discrimination necessarily represents a determination that there is, at least, "an issue of material fact" as to whether discrimination exists.

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[4] Of the nine internal female applicants who applied for pilot promotions at Northwest Airlines in 1995, four of the females filed EEOC charges and federal lawsuits against Northwest Airlines for gender discrimination, some in combination with retaliation and/or wrongful termination charges.

Both *Kremer v. Chemical Const. Co.*, 456 U.S. 461 (1982) and *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), demonstrate the deference which federal judges must pay to the administrative findings of governmental agencies established by the legislative body to investigate employment discrimination. Furthermore, *Chandler v. Roudebush*, 425 U.S. 840, n.11 (1976) states that "prior administrative findings with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial de novo . . . ". To disregard an EEOC determination, without any finding of a reason to question the reliability or expertise of the investigative agency, cannot be reconciled with the trust Congress placed in the Equal Employment Opportunity Commission when it gave it the authority to investigate claims of discrimination.[5]

Respondent argues that the "apparent circuit court conflict over what deference is to be given EEOC factual determinations is not a 'meaningful circuit conflict' ". Respondent's Brief in Opposition, p. 8. It claims that the differences between the circuits is simply over the issue of whether all EEOC reports are "per se" admissible, or whether admissibility is determined by the "sound discretion of the trial court". *Id.* According to Respondent, the conflict is an "academic" difference, Respondent's Brief in Opposition, p. 9.

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[5] The EEOC investigator gave weight to the Respondent's use of subjective qualifications ("background") to disqualify Petitioner. The experience of the EEOC in dealing with employers who use subjective criteria to cover for discrimination should have been given deference by the district judge.

In fact, the conflict is outcome determinative. A rule of "per se" admissibility means the EEOC determination has probative value and dictates denial of a summary judgment motion. If the district court were applying the alternative rule that EEOC determinations are admissible "in the sound discretion of the trial court", it should have provided guidance on what is a "sound discretion". To ignore an EEOC fact-finding made by a trained investigator who makes his determination after noting the use of subjective criteria to disqualify an otherwise outstanding candidate is not a "sound discretion".

Besides the fact that the circuits are in conflict over the weight, if any, to be given EEOC findings, the view of the lower courts below cannot be reconciled with *University of Tennessee v. Elliott*, 478 U.S. 788 (1986) and *Kremer v. Chemical Const. Corp.*, 456 U.S. 451 (1982). Both cases mandate that weight must be given to decisions of state administrative agencies in investigating discrimination. Indeed, *Elliott* holds state administrative findings are not due res judicata effect only because of the deference Congress intended to be given to the administrative procedures and investigative ability of the EEOC. *Elliott* and *Kremer* both dictate deference be afforded administrative agencies' discrimination determinations. To give findings of such agencies *no* weight, contravenes these cases.

REPLY ARGUMENT II.

THE COURT OF APPEALS DID NOT "CONSIDER AND REJECT" LUDWIG'S *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.* ARGUMENT.

Respondent claims that the Court of Appeals "considered and rejected Petitioner's *Reeves v. Sanderson Plumbing Products, Inc.* argument." Respondent's brief, p. iii.

This is impossible, since the Court of Appeals affirmed based solely on a district court opinion decided before *Reeves*. The district court could not have "considered and rejected" a case that had not yet been decided.

Unfortunately, Respondent's argument reflects a common theme among the lower courts. Several commentators have noted the lower courts either do not understand or do not apply *Reeves*, and call for further review by this Court. Ryan Vantrease, 39 Brandeis L.J. 747, *The Aftermath of St. Mary's Honor Society v. Hicks and Reeves v. Sanderson Plumbing Products, Inc., A call for clarification*, p. 747 (Spring 2001), concludes:

> No matter what test, framework, interpretation, or analysis that results from *Hicks* and *Reeves*, one thing is clear, a call for clarification is in order. It is both appropriate and necessary for the Supreme Court to review and revise its holding in *Hicks* and *Reeves* in order to hand down a steady, clear and workable framework so that the circuits may be consistent in their analysis of employment discrimination lawsuits.

Anne Lawton, 85 Minn. L. Rev. 587, December, 2000, pp. 628-629, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity* finds:

> Increasingly however, the federal courts are usurping the role of the jury by making fact determinations on summary judgment under the guise of determining whether the Plaintiff has made out a legally sufficient claim of employment discrimination.[6]

The Southern Methodist Law Review, 54 SMU L. Rev. ___ (2001), is publishing a special issue in the Fall of 2001 devoted entirely to the vanishing right to trial by jury in America.[7] Professor William V. Dorsaneo, III, 54 SMU L. Rev. ___, *Re-examining the Right to Trial by Jury*, argues regarding the misinterpretations of *Reeves*:

> [T]he Supreme Court's clear statement that the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law in jury-tried cases requires a reconsideration of the Supreme Court's most important summary judgment opinions and a re-analysis of federal summary judgment practice.

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[6] The Review found employers had obtained summary judgment 197 of 258 (76%) of the cases in its survey.

[7] See also *Echoes of the Founding: The Jury in Civil Cases as Conferrer of Legitimacy* and *Juries: On the Verge of Extinction?* in 54 SMU L. Rev. ___ 2001. The Dallas Morning News series *JURIES ON TRIAL, Right to Trial fades under Court rulings*, and *PowerShift: Laws are snatching authority from jurors and transferring it to the hands of Judges* both May 7, 2000; New York Times March 2, 2001, *Juries, Their Powers Under Siege, Find Their Role is Being Eroded* states that "scholars argue that appeals judges are now substituting their own opinions for those of jurors."

REPLY ARGUMENT III.

THE COURT SHOULD ACCEPT THIS CASE TO DETERMINE WHETHER SUMMARY JUDGMENT PROCEDURES UNDER FED.R.CIV.P. 56 ARE MODIFIED BY THE STATUTORY DUTY OF AIRLINES TO ASSURE SAFETY.

To justify its position that it was entitled to reject Petitioner based upon subjective considerations,[8]

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[8] There was an issue of material fact as to whether Petitioner's subjective qualifications could possibly have been lower than those of the male applicants. See, for example, October 25, 1995 letter written by Hector Adler, Vice President of Inflight Services (flight attendant department), to Marie Emeott, head of Human Resources for pilot hiring. Vice President Adler described Ludwig, at the time of her pilot application, as a "dedicated, conscientious employee". App. B.

Additionally, Petitioner's EEOC probable cause determination states Ludwig "was more qualified or as qualified in the areas of attendance and job performance as the successful male candidates". See also, employment records of successful 1995 male flight candidates such as Charles Skalbeck, a male attendant with numerous personal leaves and disciplinary suspensions from Northwest and the criminal conviction of Norman Prouse once fired from Northwest but rehired as a ground instructor in late 1993, then promoted to pilot again in 1995. Prouse received a felony conviction and prison sentence for flying a Northwest Airliner while intoxicated with passengers aboard against the warning of an FAA inspector. (*United States v. Prouse*, 945 F.2d 1107 (8th Cir. 1991). Respondent cannot reconcile the "backgrounds" of these and other successful male candidates with its concern for "airline safety". According to *Reeves*, differing treatment of older and younger employees is indicative of employment discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. at 2112 (2000).

Respondent cites "an airline's special obligations to provide the highest possible degree of care". 49 U.S.C. App. § 421b.

But the fact that Congress has provided that airlines must exercise the "highest possible degree of care" begs the question of whether a judge, or a jury, should determine whether safety considerations, or unlawful discrimination, is the reason for hiring decisions.

The finding of the district court, citing *Murname v. American Airlines, Inc.*, 667 F.2d 90 (D.C. Cir. 1988) that a special degree of discretion must be granted to employers in hiring pilots, does not modify the respective roles of judge and jury under Fed.R.Civ.P. 56.[9] Granting summary judgment because of judicial concern about airline safety is "recasting fact questions as law questions, . . . an obvious subterfuge." William Dorsaneo, III, *Re-examining the Right to Trial by Jury*, 54 SMU L. Rev. ___ (2001). See Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 761 (1957).

CONCLUSION

This case involves a conflict within the circuits over the weight to be given an EEOC determination of discrimination; the burden of proof required to survive summary judgment in light of *Reeves*; and whether an airline's

[9] A study that ranked 409 companies according to corporate fairness to women conducted at the time Petitioner applied for a pilot position at Northwest and published in 1997 concluded Northwest Airlines was one of the five worst "Dead End" corporations for women to work at in America. Ex. L.

discretion in pilot hiring supercedes an individual's right to equal employment opportunity.

Petitioner's case also involves a lower court and an appeals court decision that are wrong in light of *University of Tennessee v. Elliott*, *Kremer v. Chemical Const. Corp.*, and *Chandler v. Roudebush*, regarding the weight of an EEOC determination, decisions that are wrong in evaluating the circumstantial evidence necessary to survive summary judgment in light of *Reeves*.

The general importance of this case is evidenced by the current concern over the vanishing right to trial by jury due to summary judgment; the importance of the circuit's acknowledgment of and adherence to the spirit of the *Reeves'* decision in discrimination cases; and the importance of removing the guise of concerns about airline safety from an industry that continues to hold its percentage of female pilots to single digit figures with the help of Northwest Airlines, a corporation that continues to discriminate against women with seeming impunity.[10] Review by this Court is warranted.

Respectfully submitted,

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WAIDE & ASSOCIATES, P.A.
Attorneys at Law
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Tupelo, Mississippi 38802
Telephone: (662) 842-7324
Facsimile: (662) 842-8056

Counsel for Petitioner

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[10] In 1996, Northwest's percentage of females hired as pilots increased to 9.3%, only to fall back to 5.3% (below industry average) again in 1997.

[LOGO] **NORTHWEST AIRLINES**

Hector E. Adler
Vice President
Inflight Services

Northwest Airlines, Inc.
Department A5700
5101 Northwest Drive
St. Paul MN 55111-3034

612 726-3415
612 726-2488 Fax

October 25, 1995

Marie Emeott
Manager-Human Resources
Flight Operations

Re: Susan Ludwig – Pilot applicant

Dear Marie:

Ms. Susan Ludwig is a Northwest flight attendant who is pursuing career opportunities in Flight Operations as a pilot. During her 27 year tenure, Ms. Ludwig has proved to be a dedicated, conscientious employee, who is committed to providing professional service to our customers.

Please contact me if you have any questions.

Sincerely,

/s/ Hector E. Adler
Hector E. Adler

HEA:dgw

JANUARY 30, 1997

TO WHOM IT MAY CONCERN,

MY NAME IS JOHN J. RYAN, A PILOT WITH NORTHWEST AIRLINES SINCE MAY, 1983, THIS LETTER IS IN REGARDS TO DTW FLIGHT ATTENDANT, SUE LUDWIG. I HAVE KNOWN SUE SINCE MY FIRST GROUND SCHOOL WITH HER FOR FLIGHT ENGINEER ON THE B-727 IN 1983.

MY RECOLECTION [sic] OF MS. LUDWIG IN THIS GROUND SCHOOL IS THAT SHE WAS AN EXCELLENT STUDENT AND HAD NO DIFFICULTY WITH THE B-727 SYSTEMS OR GROUND SCHOOL.

I FEEL THAT SUE LUDWIG IS A DEDICATED NORTHWEST EMPLOYEE AND WOULD CONTINUE TO BE AN ASSET AS A NORTHWEST PILOT.

SINCERLY [sic],

/s/ John J. Ryan
JOHN J. RYAN

CC: S. LUDWIG

10/16/74
108678

LUDWIG
SUSAN

I. UNITED STATES OF AMERICA
Department of Transportation – FEDERAL AVIATION ADMINISTRATION

THIS CERTIFIES IV. SUSAN LOUISE LUDWIG
THAT V. 6213 PRESIDENTIAL LANE
SACRAMENTO CA 9582[illegible]

DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES	SEX	NATIONALITY VI.
10-02-52	62 in.	105	BLOND	BLUE	F	USA

IX. HAS BEEN FOUND TO BE PROPERLY QUALIFIED TO EXERCISE THE PRIVILEGES OF
II. FLIGHT ENGINEER III. CERT. NO. 58984[illegible]
RATINGS AND LIMITATIONS
XII. TURBOJET POWERED

XIII.

VII. Sue Ludwig SIGNATURE OF HOLDER X.
X. DATE OF ISSUE: 07-06-83 VIII. ADMINISTRATOR
AC Form 8060-1 (5-81)

I. UNITED STATES OF AMERICA
Department of Transportation – FEDERAL AVIATION ADMINISTRATION

THIS CERTIFIES IV. SUSAN LOUISE LUDWIG
THAT V. 6213 PRESIDENTIAL LANE
SACRAMENTO CA 9582[illegible]

DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES	SEX	NATIONALITY VI.
10-02-52	62 in.	105	BLOND	BLUE	F	USA

IX. HAS BEEN FOUND TO BE PROPERLY QUALIFIED TO EXERCISE THE PRIVILEGES OF
II. AIRLINE TRANSPORT PILOT III. CERT. NO. 58984[illegible]
RATINGS AND LIMITATIONS
XII. AIRPLANE MULTIENGINE LAND
COMMERCIAL PRIVILEGES
AIRPLANE SINGLE ENGINE LAND

XIII.

VII. Sue Ludwig SIGNATURE OF HOLDER X.
X. DATE OF ISSUE: 07-12-88 VIII. ADMINISTRATOR
AC Form 8060-1 (5-81)

UNITED STATES OF AMERICA
Department of Transportation
Federal Aviation Administration
MEDICAL CERTIFICATE First CLASS

This certifies that (*Full name and address*):
Susan Louise Ludwig
6213 Presidential Lane
Sacramento, CA 95828

Date of Birth	Ht.	Wt.	Hair	Eyes	Sex
10-2-52	62	109	Bld	Blu	F

has met the medical standards prescribed in Part 67, Federal Aviation Regulations, for this class of Medical Certificate.

Limitations: None

Date of Examination: 09-14-95
Examiner's Serial No.: ATR 16385-1
Examiner Signature: Peter J Ferrino
Typed Name: Peter J Ferrino M.D.
AIRMAN'S SIGNATURE: Sue Ludwig

FAA Form 8500-9 (7-82) Supersedes Previous Edition

DMV

EXPIRES ON BIRTHDAY
1 9 8[illegible]

DRIVER LICENSE
C4708626
Susan Louise Ludwig
6213 Presidentail Lane
Sacramento, Ca 95828

F Brn Grn 5-2-109 10-02-52

Sue Ludwig
7-84 33 30

CERTIFICATE OF RENEWAL

Issued to

SUSAN LOUISE LUDWIG
62B PRESIDENTIAL LN
SACRAMENTO, CA 95828

Sue Ludwig
SIGNATURE

Valid only if signed and carried with Driver License Number C4708626

Fee PAID

Expires on Birthday in 1995

DL 4A (REV. 9[illegible]) HQ LB:PR

Frank Zolin
FRANK S. ZOLIN, Director

UNITED STATES OF AMERICA
Federal Communications Commission
Restricted Radiotelephone Operator Permit

Susan Louise Ludwig

is authorized to operate any radio station which may be operated by a person holding this class of license. This permit is issued in conformity with Paragraphs 3454 and 3945 of the Radio Regulations, Geneva 1979, and is valid for the lifetime of the holder unless suspended by the FCC.

Not valid without FCC Seal

Sue Ludwig

App. 3

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No. 00-1768

In The

Supreme Court of the United States

SUSAN LUDWIG,

Petitioner,

v.

NORTHWEST AIRLINES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

SUPPLEMENTAL REPLY TO NORTHWEST AIRLINE'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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3 PP

ARGUMENT

The overriding national importance of airline safety concerns indicate this Court should hear this case to determine the role that airline safety plays in the lower court's decision to grant summary judgment.

The general lack of airline safety has now resulted in the death of thousands. While the evidence is not yet complete on the role that increased airline safety could have played in preventing these tragedies, this national focus provides an apt opportunity for the Court to decide the appropriate role of judge and jury in determining whether or not concerns about airline safety are being used to mask sex discrimination.

In this case, females, including the Petitioner, passed the Respondent's "objective pilot personality tests", which are used to eliminate those whose personality were not consistent with airline safety. Females passed the test at a far higher rate than did the male applicants. Emeott depo., pp. 24-25. Respondent then eliminated this objective test, and substituted a subjective test, which restored to the applicant field those who had failed the objective pilot personality tests. In granting the summary judgment, the district judge relied upon a purported need for airline safety in deferring to the airline's judgment of safety. With the nation being focused upon a need for airline safety, there can be no more appropriate time for this Court to determine whether a district judge, in granting a summary judgment, must "defer" to an airline's "special obligations to provide the highest possible degree of care". 49 U.S.C. App. § 421(B).

The personality type that the female internal pilot candidates possess as evidenced by their successful objective testing in 1995 is of crucial importance in the face of the new stresses and safety concerns facing all American flight crews in the wake of the terrorist attacks of September 11, 2001. Northwest Airlines, however, has male pilots currently flying passengers who failed their own preliminary objective safety tests for basic knowledge and personality type in 1995.[1]

CONCLUSION

The present time of concern for airline safety is an apt time for this Court to decide whether a district judge may defer to an airline's alleged safety concerns in considering a motion for summary judgment.

Respectfully submitted,

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Counsel for Petitioner

[1] Northwest Airline's Senior Vice-President of Flight Operations, John Kern, told petitioner that Northwest's internal promotion pilot program was created to help get rid of the "good ol' boys club" that Kern knew existed in Northwest Airlines pilot department. (Petitioner Affidavit).